Supreme Court, U.S.
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No. 02-

In the Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a punitive damages judgment of $79.5 million is unconstitutionally excessive under *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. __, No. 01-1289 (decided April 7, 2003), and *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996), when:

   a. the award is 97 times the plaintiff's substantial compensatory damages;

   b. the court below explicitly relied on harms to non-parties, lawful conduct, and dissimilar conduct to justify the award; and

   c. the court below explicitly relied on the defendant's financial condition to justify disregarding the requirement that punitive damages bear a reasonable relationship to the plaintiff's harm.

2. Whether, pursuant to *State Farm* and *BMW*, petitioner had a constitutional right to have the jury instructed that any punitive damages award must be reasonably related to the harm to the plaintiff.

3. Whether Oregon's "rational juror" standard for the review of punitive damages awards is unconstitutional under *State Farm*, *BMW*, and *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

4. Whether a state law tort claim that imposes a duty on cigarette manufacturers to disclose information related to smoking and health is foreclosed by the preemption provision of the Federal Cigarette Labeling and Advertising Act.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA Inc.'s corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns ten percent or more of Philip Morris USA Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip Morris USA Inc. ("Philip Morris") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Oregon in this case.

OPINIONS BELOW

The decision of the Oregon Court of Appeals (App., *infra*, 1a-34a) is reported at 48 P.3d 824. That court's opinion on reconsideration (App., *infra*, 35a-39a), is reported at 51 P.3d 670. The order of the Supreme Court of Oregon denying review (App., *infra*, 40a) is reported at 61 P.3d 938 (table).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The Oregon Supreme Court denied discretionary review in this case on December 24, 2002. Justice O'Connor extended the time for filing this petition to April 23, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq., provides in relevant part:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).

STATEMENT

Jesse Williams began smoking cigarettes in 1950 when he was in the Army. He did so because other soldiers told him that the smoke would help keep mosquitoes away. Beginning in 1955, and for most of the rest of his life, Williams smoked Marlboros – a brand manufactured and marketed by Philip Morris. App., *infra*, 3a. Williams was a heavy smoker, ultimately consuming three packs of cigarettes a day.

Williams had been taught as a child that smoking was unhealthy, and he and his wife, in turn, taught their children not to smoke. Citing the dangers of tobacco, Williams's wife and children repeatedly urged him to stop smoking, as did his physician. Although Williams himself referred to cigarettes as "cancer sticks," he reacted angrily when confronted with information about the risks of smoking. For example, his wife frequently pointed to the warning labels on cigarettes packages and told him that cigarettes would kill him. According to her testimony, Williams would respond: "Phooey. * * * This is what the Surgeon General says, it's not what [the] tobacco company says." Williams said that he gave no credence to the Surgeon General's warnings because he did not believe that the tobacco companies would sell a harmful product. Williams's wife also testified that "he would say 'Well, honey, you see I told you * * * cigarettes are not going to kill you, because I just heard this so-and-so guy on TV, and he said that tobacco doesn't cause you cancer!'" There was no evidence, however, that Philip Morris or its agents ever made any statement on television (or anywhere else, for that matter) denying that smoking causes cancer.

In 1996, Williams was diagnosed with lung cancer. Upon learning of the diagnosis, Williams reportedly said, "Those darn cigarette people finally did it. They were lying all the time." Williams died in March 1997. App., *infra*, 5a.

Williams's widow ("plaintiff") sued Philip Morris, alleging that the company was negligent because it (1) sold cigarettes

that it knew or should have known were addictive and caused cancer; (2) manipulated the contents of cigarettes in order to maintain and enhance their addictive effects; (3) failed to test cigarettes in ways likely to link smoking with human disease; and (4) failed to manufacture a safer cigarette. Plaintiff also alleged that the company engaged in fraud by falsely contending that a link between cigarettes and cancer had not been scientifically established, which caused Williams to continue smoking.

At trial plaintiff mounted a wide-ranging attack on 50 years of Philip Morris's conduct, introducing evidence concerning everything from its research practices to its litigation positions to its dealings with its competitors. In closing arguments, plaintiff explicitly and repeatedly urged the jury to punish Philip Morris for the harm caused not just to Williams, but also to masses of other, unidentified people:

> In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third * * *.

Plaintiff further urged:

> When you determine the amount of money to award in punitive damages against Philip Morris * * * [i]t's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future.

In response, Philip Morris sought an instruction that any punitive damages award must bear a reasonable relationship to the compensatory damages awarded to plaintiff. The trial court refused this proposed instruction and instead told the jury that

it was free to award punitive damages up to $100 million, the amount requested in plaintiff's complaint.

The jury found for plaintiff on both fraud and negligence. It awarded $79.5 million in punitive damages for fraud but unanimously rejected the request for punitive damages on the negligence claim. The trial court concluded that although the punitive damages verdict "was within a range a rational juror could assess," the award was "excessive under federal standards"; it accordingly reduced it to $32 million – still 39 times the compensatory damages verdict (and 64 times the compensatory award as limited by Oregon's statutory cap).

The court of appeals upheld the liability findings. It rejected Philip Morris's claim that the jury should have been instructed that any punitive damages award must bear a reasonable relationship to the harm caused to Williams himself – as opposed to non-parties – stating: "the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages." App., *infra*, 23a.

The court then reinstated the jury's $79.5 million award, after reviewing it under the highly deferential "rational juror" test articulated by the Oregon Supreme Court in *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d 473, 482 n.10 (Or. 2001). App., *infra*, 23a-34a. This test inquires "whether the award is one that a rational juror could make." *Id.* at 19a. In finding the jury's award supported by the record, the court relied primarily on certain "categories of evidence" identified by plaintiff. Although the court treated these "categories of evidence" as tantamount to jury findings, the jury itself had made no explicit findings of any kind.

In holding that the $79.5 million punitive award was not unconstitutionally excessive under the proportionality guidepost of *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996), the court justified the 97:1 ratio on the ground that the jury could have inferred that cigarettes caused harm to persons

other than Williams, and could have punished Philip Morris for those non-party injuries. The court reasoned that, under *Parrott*, the high ratio was warranted because of "the potential injury that [Philip Morris's] misconduct *may have caused* to past, present, and future customers." App., *infra*, 30a (emphasis added). The court acknowledged Philip Morris's "legitimate[] concern[]" that the punitive award might be excessive when combined with future awards for the same conduct, but it concluded that this problem could be avoided by having "future juries and courts" take prior punitive awards into account when imposing additional punitive damages. *Id.* at 31a.

Finally, the court relied on Philip Morris's wealth to justify the high punitive damages award. It asserted that "when the record contains evidence of the defendant's financial condition, determining the proper relationship between the punitive award and the actual harm may well include consideration of that evidence." App., *infra*, 31a. The court concluded that the jury "could have believed in light of defendant's profits that only a large award would be proportionate to the harm that defendant caused." *Id.* at 31a-32a.

REASONS FOR GRANTING THE PETITION

In almost every respect, the rationale of the court below in upholding the jury's punitive verdict stands in direct conflict with this Court's recent decision in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. __, No. 01-1298 (decided April 7, 2003). Likewise, its rulings on Philip Morris's proposed "reasonable relationship" jury instruction and on the standard of review cannot be reconciled with *State Farm*. Finally, the court below erroneously relied on certain bases of liability that are preempted by federal law. The case must, at a minimum, be vacated and remanded for further proceedings consistent with *State Farm*.

I. THE COURT OF APPEALS' RULING ON EXCESSIVENESS DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *STATE FARM*

A. The 97:1 Ratio Of Punitive To Compensatory Damages Renders The Award Presumptively Unconstitutional

State Farm makes clear that the 97:1 ratio of punitive to compensatory damages in this case cannot withstand constitutional scrutiny. While there is no "bright-line ratio which a punitive damages award cannot exceed," this Court's "jurisprudence and the principles it has now established demonstrate * * * that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, slip op. at 14. Indeed, in *State Farm*, as in *BMW*, this Court pointedly repeated its earlier observation in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, slip op. at 14. The Court also cited "a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* at 15 (citing *BMW*, 517 U.S. at 581 & n.33).

The ratio in this case could hardly be further from those traditional, single-digit multipliers. That distance is particularly unjustifiable because the compensatory damages of $521,486 ($821,486 before application of the statutory cap) are substantial, and hence "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, slip op. at 15. In applying the ratio guidepost, "[c]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Ibid.* That did not happen here. Accordingly, the petition

should be granted, the judgment vacated, and the case remanded for reconsideration in light of *State Farm.*

B. The Court Of Appeals' Effort To Justify The Award By Reference To The Hypothetical Claims Of Non-Parties And By The Invocation Of Dissimilar Conduct Conflicts With *State Farm*

The court of appeals explicitly justified the award as punishment for "the potential injury that [Philip Morris's] misconduct may have caused to past, present, and future customers." App., *infra,* 30a. *State Farm* makes clear that such an approach is untenable. The Court there stated that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *." *State Farm*, slip op. at 12. *State Farm* goes on to note that "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Ibid.* The award thus cannot be salvaged by reference to supposed harm to other smokers – who, after all, have the opportunity (and the incentive, given the large compensatory award in this case, to say nothing of the punitive damages) to bring their own lawsuits in which the merits of their individual claims will be tested.

The court below also declared it "reasonably inferable from the evidence that defendant's products, used as defendant intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences." App., *infra*, 26a. That rationale for the jury's award not only improperly looks to harm suffered by non-parties but also constitutes punishment for lawful conduct, and thus cannot stand. It is entirely lawful to manufacture and market cigarettes, despite the fact that they are

dangerous. See *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 570-71 (2001). Punitive damages – or, for that matter, liability of any sort – cannot be based on the fact that Philip Morris manufactures products that, "used as defendant intended them to be used, caused a significant number of deaths each year," App., *infra*, 26a, for "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). See also *State Farm*, slip op. at 10 ("A State cannot punish a defendant for conduct that may have been lawful where it occurred"). Accordingly, the court of appeals ventured onto constitutionally forbidden ground when it sought to justify the award based on the harms done by smoking generally.

The court of appeals' effort to justify the award by reference to the overall damage caused by smoking is flawed for another reason, as well: the jury here imposed punitive liability only for fraud. It specifically *declined* to impose punitive liability on the negligence count – the only count in which plaintiff claimed that Philip Morris's products were unreasonably dangerous when used as intended. It therefore is legally irrelevant, for purposes of punitive damages in this case, that cigarettes, "used as defendant intended them to be used, cause a significant number of deaths each year." App., *infra*, 26a. That ground was one on which Philip Morris *prevailed* as to punitive damages; the court of appeals thus was not entitled to rely on it as a justification for the excessive award.

C. The Court Of Appeals' Holding That The 97:1 Ratio Can Be Justified On The Basis Of Philip Morris's Financial Condition Conflicts With *State Farm*

In addition to relying on harms to non-parties, lawful conduct, and dissimilar conduct, the court of appeals justified the award by reference to Philip Morris's financial condition. Stating that "there is more to the issue of proportionality than

the dollar amounts involved," the court asserted that "the jury could have believed, in light of defendant's profits, that only a large award would be proportionate to the harm the defendant caused." App., *infra*, 31a-32a. This Court made clear in *State Farm*, however, that a defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm," and "cannot justify an otherwise unconstitutional punitive damages award." Slip op. at 17. Because the court of appeals sought to use wealth for precisely that impermissible purpose, the petition should be granted, the judgment vacated, and the case remanded for further consideration in light of *State Farm*.

II. PETITIONER HAD A CONSTITUTIONAL RIGHT TO HAVE THE JURY INSTRUCTED THAT ANY PUNITIVE DAMAGES MUST BE REASONABLY RELATED TO THE PLAINTIFF'S HARM

Philip Morris asked the trial court to instruct the jury that any award of punitive damages had to bear a reasonable relationship to the plaintiff's harm.[1] The trial court refused to give the instruction, and gave no other instruction concerning the reasonable-relationship requirement.

The court of appeals found that Philip Morris's proposed instruction was inconsistent with Oregon law because, in the course of stating the ratio requirement, the instruction explained that the jury was not to punish the defendant for the impact of

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[1] The proposed instruction stated:

> "The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit."

its alleged misconduct on other persons. App., *infra*, 23a (citing *Parrott*, 17 P.3d at 489; Or. Rev. Stat. § 30.925(2)(g)). *State Farm* now confirms that Philip Morris's proposed instruction correctly stated the law and that Oregon's rule to the contrary, as set forth in *Parrott* and this case, conflicts with the requirements of due process. See Point I.B *supra*.

State Farm not only establishes the correctness of the proposed instruction, it also supports the conclusion that the refusal to give such an instruction is constitutional error. The *State Farm* Court expressed concern that, particularly where (as here) "the decisionmaker is presented * * * with evidence that has little bearing as to the amount of punitive damages that should be awarded * * * [, v]ague instructions * * * do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." Slip Op. at 7. The Court went on to hold that a jury "must be instructed" about the bar against punishing for lawful, out-of-state conduct. *State Farm*, slip op. at 11. There is no principled reason to conclude that other, equally fundamental constraints on punitive damages are not also subjects as to which a defendant is entitled to have the jury instructed.

The constitutional error regarding the reasonable-relationship instruction was compounded by another error that severely amplified the prejudice: the *sole* objective guidance that the jury received in its place was the trial court's instruction that the upper limit of permissible punitive damages was $100 million. That instruction was based on nothing other than a figure picked from thin air by plaintiff, obviously for her own advantage. See, *e.g.*, *Gresham* v. *Courson*, 177 So. 2d 33, 39 (Fla. 1st D.C.A. 1965) ("we would be exceedingly naive should we fail to recognize that as a matter of practice the advocate usually suggests to the jury a figure for damages substantially in excess of the amount that is clearly supportable by the evidence and likewise in excess of the amount which he deems to be supportable in point of law should the jury happen to

return a verdict approaching the amount he suggested."). Here the jury was not even told that this "limit" was derived from plaintiff's complaint, further confirming the impression that $100 million was in fact a legally permissible amount of punitive damages to award.[2]

In the wake of *State Farm*, it is clear that such error violates the Constitution. *State Farm* confirms that under any circumstances – even if the jury had awarded every penny of compensatory damages that plaintiff sought ($1,028,486) – the ratio generated by a $100 million award would have been presumptively unconstitutional. See *State Farm*, slip op. at 14-16 (due process ordinarily will require single-digit multipliers). It cannot be permissible to instruct a jury that it can return an award that would if rendered be unconstitutionally excessive. Moreover, as the Court explained in *State Farm*, punishment must be limited to that which "satisfies the State's legitimate objectives," and no more. *State Farm*, slip op. at 9. A plaintiff must not, therefore, be permitted to pick whatever figure she desires and have the jury instructed that it can return an award up to that amount.

In sum, the jury was kept in the dark about an important, constitutionally based limitation on its punitive verdict and simultaneously encouraged to return a huge award by the instruction concerning plaintiff's self-selected and plainly excessive figure. *State Farm* confirms that either error, and certainly the whipsaw consequence of the two combined, violates due process. Accordingly, the petition should be granted, the judgment vacated, and the case remanded for reconsideration in light of *State Farm*.

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[2] Jury instructions of this type have been demonstrated to distort the jury's frame of reference and drive its deliberations. See Cass R. Sunstein, *et al.*, PUNITIVE DAMAGES: HOW JURIES DECIDE 211, 240 (2002).

III. OREGON'S HIGHLY DEFERENTIAL STANDARD FOR THE REVIEW OF PUNITIVE DAMAGES DOES NOT COMPORT WITH *STATE FARM* OR OTHER DECISIONS OF THIS COURT

By statute and case law, Oregon courts are directed to approve a punitive damages verdict if it "is within the range of damages that a rational juror would be entitled to award based on the record as a whole * * *." Or. Rev. Stat. § 18.537(2); *Parrott*, 17 P.3d at 482 n.10. The Oregon Supreme Court has explained that this standard of review essentially inquires into "whether 'a rational basis' exists for the particular amount of punitive damages assessed." *Oberg* v. *Honda Motor Co.*, 888 P.2d 8, 12 (Or. 1995).

In practice, Oregon has relied on its "rational juror" standard to return to the days before this Court's decision in *Honda Motor Co.* v. *Oberg*, 510 U.S. 1068 (1994), when a jury's punitive damages verdict, no matter how large, would not be disturbed so long as there was any evidence to support punitive liability. Since *Oberg*, Oregon courts have approved 13 of the 14 punitive damages jury verdicts that they have considered.[3]

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[3] See, in addition to this case, *Waddill* v. *Anchor Hocking, Inc.*, 27 P.3d 1092 (Or. App. 2001) (upholding $1 million punitive award), vacated and remanded for reconsideration in light of *State Farm*, 71 U.S.L.W. 3178 (Apr. 21, 2003); *Parrott* v. *Carr Chevrolet Inc.*, 17 P.3d 473 (Or. 2001) (vacating court of appeals' remittitur of punitive damages to $300,000 and reinstating $1 million jury award); *Cantua* v. *Creager*, 7 P.3d 693 (Or. App. 2000) (upholding $10,000 punitive award); *MacCrone* v. *Edwards Ctr., Inc.*, 980 P.2d 1156 (Or. App. 1999) (vacating trial court's remittitur of punitive damages to $1 million and reinstating $1.25 million jury award); *Kraemer* v. *Harding*, 976 P.2d 1160 (Or. App. 1999) (upholding $75,000 punitive award); *Axen* v. *American Home Prod. Corp.*, 974 P.2d 224 (Or. App. 1999) (upholding $20 million punitive award); *Bocci* v. *Key Pharm., Inc.*, 974 P.2d 758 (Or. App. 1999) (upholding $22.5 million award), vacated and remanded for reconsideration in light of *State Farm*, 71 U.S.L.W. 3169 (Apr. 21, 2003); *Parrott* v. *Carr*

In the sole case in which the court of appeals ordered a remititur, the Oregon Supreme Court has granted review to consider, *inter alia*, whether it was error to reduce the jury's punitive verdict from $1.25 million to $175,000. *Jensen* v. *Medley*, 11 P.3d 678 (Or. Ct. App. 2000), review allowed, 52 P.3d 436 (2002). In four cases, including this one, the appellate courts *reinstated* jury verdicts that had been reduced by the trial court. These decisions have been justified on the ground that the punitive damages were "within the range that a rational jury would be entitled to award in light of the record as a whole." See App., *infra*, 19a; *Oberg*, 888 P.2d at 12; *Parrott*, 17 P.3d at 484, 489; *Stranahan* v. *Fred Meyer, Inc.*, 958 P.2d 854, 871-72 (Or. Ct. App. 1998), rev'd on other grounds, 11 P.3d 228 (Or. 2000).

The Oregon courts' "rational basis" standard of review is inconsistent with this Court's precedents. In *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), for example, five Justices (the three-Justice plurality, plus two of the dissenters) expressly rejected a standard indistinguishable from that adopted by Oregon. The plurality explained: "Under respondents' rational basis standard, apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." *Id.* at 456 (emphasis in original); *id.* at 480

Chevrolet, Inc., 965 P.2d 440 (Or. App. 1998) (vacating trial court's remittitur of $1 million jury award to $50,000 and increasing remitted award to $300,000); *Stranahan* v. *Fred Meyer, Inc.*, 958 P.2d 854 (Or. App. 1998) (vacating trial court's remittitur and reinstating $2 million jury award), rev'd on other grounds, 11 P.2d 228 (Or. 1998); *Blume* v. *Fred Meyer, Inc.*, 963 P.2d 700 (Or. App. 1998) (upholding $450,000 punitive award); *Purcell* v. *Asbestos Corp., Ltd.*, 959 P.2d 89 (Or. App. 1998) (upholding $3 million punitive award); *Northwest Natural Gas Co.* v. *Chase Gardens, Inc.*, 938 P.2d 778 (Or. App. 1997) (upholding $3 million punitive award); *Lakin* v. *Senco Prod., Inc.*, 925 P.2d 107 (Or. App. 1996) (upholding $4 million punitive award).

(O'Connor, J., joined by White, J., dissenting) (agreeing that "we ought not adopt *TXO*'s or respondents' suggested approach").

In *BMW*, the Court again rejected the notion that any award a jury might reasonably think appropriate to punish and deter is constitutional, stating: "The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal." 517 U.S. at 584. And, most recently, the Court explained in *State Farm* (slip op. at 9) that "a more modest punishment for [State Farm's] reprehensible conduct could have satisfied Utah's legitimate objectives, and the Utah courts should have gone no further."

Oregon's failure to exercise meaningful judicial oversight of punitive damage awards is compounded by application of its overly lax standard of review to "findings" that the jury did not make but that a court speculates the jury "could have" made. In this case, the court of appeals was faced with a record that did not reveal what specific factual findings the jury made and relied upon in assessing punitive damages. The court conducted the excessiveness inquiry by *speculating* as to supposed findings that the jury "could have" made and then upholding the punitive damages award based on those hypothetical findings. App., *infra*, 23a-26a.[4]

The due process protections against excessive punitive damages require that courts engage in a searching inquiry into the basis for any punitive award. *State Farm*, slip op. at 8. If a jury supports its award with specific factual findings (and

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[4] In *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court observed that reviewing courts should defer to "specific findings of fact" made by the jury. *Id.* at 439 n.12. The clear implication of that formulation is that reviewing courts need not and should not defer to findings that the jury did not specifically make.

plaintiff sought none here), those findings deserve deference; in the absence of specific jury findings, however, an appellate court may not simply assume that all possible factual findings that could have been made against the defendant were in fact made, and then uphold the punitive award on that basis. This Court should grant the petition, vacate the judgment, and remand for further consideration in light of *State Farm*.

IV. THE COURT OF APPEALS BASED ITS AFFIRMANCE OF THE PUNITIVE AWARD IN PART ON CONDUCT FOR WHICH LIABILITY IS PREEMPTED BY FEDERAL LAW

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* (the "FCLAA"), preempts any state law "requirement or prohibition based on smoking and health" that relates to the advertising or promotion of cigarettes. This Court has held that the FCLAA preempts any state requirement that cigarette companies convey information to the public about smoking and health beyond the package labeling compelled by federal law. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 524 (1992). The court of appeals' decision, which upheld liability because Philip Morris failed to disseminate data concerning the harmful health effects of smoking, plainly conflicts with *Cipollone*, as well as with the decisions of other courts. This issue has substantial practical importance: there currently are hundreds of lawsuits pending against cigarette manufacturers on similar claims in state and federal courts.

Congress's purpose in enacting the FCLAA was "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. Pursuant to this policy, (1) consumers were to be given what Congress determined to be an adequate warning, and (2) commerce was to be protected "to the maximum extent consistent with this declared policy" and "not impeded by diverse, nonuniform, and confusing" labeling and advertising requirements. *Ibid.*

To achieve the first objective of the FCLAA, Congress specified the exact language of the health warnings to be included on all cigarette packages and advertising. See 15 U.S.C. § 1333. To achieve the second objective, Congress included an express preemption provision:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). In *Cipollone*, the plurality held that the preemption provision encompasses state law damages actions. See 505 U.S. at 521. Thus, the FCLAA bars any state law tort claim that tobacco companies "neutralized the effect of the federally mandated warning labels" through their advertising and promotional activities (*id.* at 527), as well as any claim that cigarette manufacturers failed to disclose information regarding smoking and health. *Id.* at 524-25.

Subsequent to *Cipollone*, the Fifth Circuit rejected a "false impression" theory virtually identical to that relied upon by the plaintiff in this case. See *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996) (claims that defendant cigarette manufacturers (1) "discovered the health risks of tobacco through their research, and fraudulently concealed that information from the public," and (2) "lull[ed] Allgood into a false sense of security regarding his health and smoking" through "the industry's general 'it's not proven' campaign" were preempted). See also *Cantley* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996) (claim that tobacco companies failed to warn consumers about health risks of smoking was preempted by FCLAA).

The jury's verdict here – and the Oregon Court of Appeals' affirmance of that verdict – is based on a theory virtually identical to the "false impression" theory rejected in *Allgood* and the failure-to-warn theory rejected in *Cantley*. Plaintiff's

theory was that Philip Morris created a false "impression in the public" that there was a legitimate controversy about the health effects of smoking. App., *infra*, 8a. According to the court of appeals, Philip Morris created this false impression in part by calling for more research and failing to disclose its biological research overseas. *Id.* at 15a. Moreover, the jury heard – and the court below relied upon – evidence from plaintiff suggesting that the federally-mandated warnings had been inadequate because Williams refused to believe them in the absence of confirmation from the tobacco industry. App., *infra*, 20a & n.16.

The "false impression" theory endorsed by the court of appeals constitutes a state law "prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Cipollone*, 505 U.S. at 527. Oregon has thus imposed a duty on cigarette manufacturers directly related to the "timely and widespread dissemination of research findings" and to a consumer's ability to "make informed decisions about smoking" that is greater than the requirements imposed by Congress. *Ibid.* Cf. *Reilly*, 533 U.S. at 542 (holding that, as a matter of law, FCLAA warnings "inform the public adequately about the hazards of cigarette smoking"). By permitting Oregon courts and juries to make their own determinations about the adequacy of the congressionally mandated warning and the propriety of advertising and promotional campaigns, the decision below threatens precisely the "diverse, nonuniform, and confusing" results that Congress sought to avoid. 15 U.S.C. § 1331(2).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for consideration in light of *State Farm*. Alternatively, the Court should grant plenary review.

Respectfully submitted.

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APRIL 2003

APPENDIX

APPENDIX A

OREGON COURT OF APPEALS OPINION

Court of Appeals of Oregon

Nos. 9705-03957; A106791.

Mayola WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Appellant-Cross-Respondent,

v.

PHILIP MORRIS INCORPORATED,

Respondent-Cross-Appellant,

and

RJ Reynolds Tobacco Company, Fred Meyer, Inc., and Philip Morris Companies, Inc.,

Defendants.

Argued and Submitted Oct. 26, 2001.

Decided June 5, 2002.

James S. Coon argued the cause for appellant-cross-respondent. With him on the briefs were Raymond F. Thomas, Douglas A. Swanson, and Swanson, Thomas & Coon; William A. Gaylord, and Gaylord & Eyerman, P.C.; and Charles S. Tauman, Maureen Leonard, Kathryn H. Clarke, Portland, and Bennett, Hartman & Reynolds.

William F. Gary argued the cause for respondent-cross-appellant. With him on the briefs were

Sharon A. Rudnick, Eugene, James E. Mountain, Jr., Salem, and Harrang Long Gary Rudnick, P.C.

James N. Westwood, Portland, Scott E. Crawford, and Stoel Rives LLP, filed the brief *amicus curiae* for Associated Oregon Industries.

David F. Sugerman, Portland, and Paul & Sugerman, P.C., and Steven C. Berman, filed the brief *amicus curiae* for Alliance for Lung Cancer Advocacy, Support and Education; American Lung Association of Oregon; American Heart Association; American Cancer Society; and Oregon Trial Lawyers Association.

Before EDMONDS, Presiding Judge, and ARMSTRONG and KISTLER, Judges.

EDMONDS, P.J.

Defendant Phillip Morris, Inc., is this country's largest manufacturer of cigarettes. Plaintiff is the widow and personal representative of the estate of Jesse Williams (Williams), who began smoking defendant's cigarettes in the early 1950s and continued until his death from a smoking-related lung cancer in 1997. Plaintiff brought this action to recover compensatory and punitive damages for Williams' death. The jury found for plaintiff on her claims of negligence and fraud, awarding economic damages of $21,485.80 and noneconomic damages of $800,000 on each claim. On the negligence claim, it found that Williams' negligence was 50 percent of the cause of his harm and declined to award punitive damages. It awarded punitive damages of $79.5 million on the fraud claim. The trial court reduced the punitive damages award to $32 million, on the ground that the jury's award was excessive under the United States Constitution, and reduced the award of noneconomic damages to $500,000 in accordance with ORS 18.560(1). *See Greist v. Phillips*, 322 Or. 281, 906 P.2d 789 (1995). It then

entered judgment on the fraud claim as modified.[1] Plaintiff appeals, assigning error to the reduction of the punitive damages award. Defendant cross-appeals, assigning error to a number of rulings relating to both the fraud and negligence claims. We reverse on the appeal, affirm on the cross-appeal, and remand for the trial court to enter judgment accordingly.

Because of the jury's verdict, we state the facts most favorably to plaintiff, drawing all reasonable inferences in her favor. *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 490-91, 982 P.2d 1117 (1999). We first describe the facts relating to Williams himself, reserving most of the facts relating to defendant's conduct for our discussion of the various legal issues that the parties raise. Williams began smoking Phillip Morris cigarettes while he was in the Army in Korea in the early 1950s. The Army provided the cigarettes, and other soldiers told him that the smoke would help keep mosquitoes away. He smoked them until the mid 1950s, when he switched to Marlboros, another Phillip Morris brand. He made the switch about the time that defendant repositioned the Marlboro brand from one that was oriented toward women to one of the first male-oriented filter cigarettes. Williams continued to smoke Marlboros or Marlboro Lights for the rest of his life,[2] ultimately increasing to three packs a day. At that point he was spending half of his waking hours smoking.

Both Williams' wife and their children encouraged him to stop smoking, telling him that cigarettes were dangerous to his

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[1] The court did not reduce the award of compensatory damages on the fraud claim to reflect the jury's finding of comparative fault, which it would have done if it had based the amount of the judgment on the negligence claim. *See* ORS 18.470.

[2] There is some indication that Williams may have occasionally smoked other Phillip Morris brands. There is no evidence that he smoked non-Phillip Morris cigarettes other than incidentally.

health. In response, he insisted that the cigarette companies would not sell cigarettes if they were as dangerous as his family claimed, and he stated that he had heard on television that cigarettes do not cause cancer. He quoted to them from what he said he had heard about why cigarette smoking was not harmful to a smoker's health. He also told his wife, "the tobacco company, they never said that anything like this is going to harm you. They never said there was anything wrong with the tobacco." When one of his sons would try to get him to read articles about the dangers of smoking, Williams would respond by finding published assertions showing that cigarette smoking is not dangerous.

Williams nevertheless made several unsuccessful attempts to stop smoking, trying various methods that included quitting "cold turkey," reducing the number of cigarettes, using nicotine patches, and using nicotine gum. He did not persist in any of those attempts for a significant time period. Williams' desire for cigarettes was so strong that, if he ran out of cigarettes during an ice storm, he would go to a store for cigarettes, despite the hazards of traveling in such conditions, even if he had no other reason to leave his residence. When his wife prohibited smoking in the family home, he went outdoors to smoke. At restaurants, he would leave his wife in the nonsmoking section during the meal in order to have a cigarette in the smoking section. His smoking was the major source of tension between Williams and his wife. According to an expert witness, Williams was highly addicted to cigarettes, and that addiction was physiological as well as psychological.

Williams was generally in good health and rarely saw a physician. However, in late 1995 and early 1996, he developed a cough and began, at times, to spit up blood. A radiologist interpreted chest X-rays taken at that time as normal.[3] The

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[3] Both plaintiff's and defendant's radiologists at trial agreed that, viewed in retrospect, those X-rays showed a tumor. The course of Williams' cancer would not have been different if it

problem recurred a few months later, and he began losing weight. X-rays and other tests in September and October led to a diagnosis of an inoperable poorly differentiated adenosquamous carcinoma in Williams' right lung. According to expert testimony, the primary cause of that kind of cancer is cigarette smoking.[4] When Williams learned of the diagnosis, he expressed a feeling of betrayal. He said, "those darn cigarette people finally did it. They were lying all the time." He wanted to let other people know that they were being deceived about the harm that cigarettes could do to them. Williams received chemical and radiation therapy that provided only temporary benefits, and he died in March 1997.

Because plaintiff's appeal relates solely to the reduction of the punitive damages award, we begin with defendant's cross-appeal. Defendant first assigns error to the trial court's denial of its motion for directed verdict on plaintiff's fraud claim. Resolving that assignment depends on understanding plaintiff's theory concerning how defendant made material misrepresentations of fact, how the misrepresentations were made to Williams, and how he relied on them. In Oregon the elements of fraud are:

> "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury."

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had been diagnosed at that time, according to the testimony.

[4] Defendant's experts testified that Williams had an extremely rare form of lung cancer that is not related to smoking. Plaintiff presented contrary evidence, and the jury by its verdict implicitly accepted plaintiff's view.

Conzelmann v. N.W.P. & D. Prod. Co., 190 Or. 332, 350, 225 P.2d 757 (1950).[5] A plaintiff must prove each element of the tort by clear and convincing evidence, or evidence that establishes that the truth of the facts alleged is highly probable. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or. 390, 392, 402, 737 P.2d 595 (1987).[6]

Also, the trial court held that two separate legal principles impose significant limitations on plaintiff's claims. First, ORS 30.905(1), the statute of ultimate repose, extinguishes claims for injuries that occurred more than eight years after a product is first purchased. Plaintiff therefore had to prove that the cigarettes that Williams purchased after September 1, 1988, which the parties treated as eight years before his injury, were a substantial factor in causing his cancer and death. Secondly, under 15 USC § 1334, the federally required warning that appears on each cigarette package preempts all state regulation of the advertising and promotion of cigarettes that carry the warning. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 527-28, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), the United States Supreme Court held that the preemption extends to state common-law claims as well as to state statutes and regulations. Thus, plaintiff may not base her fraud claim on allegations that defendant fraudulently concealed information

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[5] The Supreme Court has suggested that those nine requirements may unduly fractionalize the essential elements of a fraud claim. For example, proof of reliance on a fraudulent statement may be sufficient in itself to prove the hearer's ignorance of the falsity of the statement. *See Briscoe v. Pittman*, 268 Or. 604, 610, 522 P.2d 886 (1974).

[6] A plaintiff may prove compensatory damages arising out of the fraud by a preponderance of the evidence. *Riley Hill General Contractor*, 303 Or. at 392-93, 737 P.2d 595. Punitive damages require proof by clear and convincing evidence. ORS 18.537(1).

concerning smoking and health. She is limited to allegations of affirmative misrepresentations. Neither party challenges on appeal the trial court's rulings regarding the statute of ultimate repose and the effect of 15 USC § 1334.

Defendant's primary argument on cross-appeal focuses on the first, seventh, and eighth elements of fraud, involving the alleged representations and Williams' reliance on them. Defendant asserts that there is no evidence that it made *any* representation to Williams or that Williams relied on any representation that it may have made. Defendant asserts,

> "The essence of a claim of fraud is a communication by the defendant which is received and relied upon by the plaintiff. As Plaintiff acknowledged, she could not prove any such communication by Phillip Morris to Williams. Therefore her fraud claim fails."

Defendant interprets the requirement that plaintiff rely on a misrepresentation as meaning that "an alleged false representation must be identified specifically so that it can be critically examined." According to defendant, plaintiff cannot prove her claim without proof that defendant made a specific misrepresentation to Williams.

Defendant interprets the cases on which it relies for support as standing for more than they do. The cases that defendant cites either simply repeat the requirement that there be a misrepresentation, *see, e.g.*, *Gregory v. Novak*, 121 Or.App. 651, 654, 855 P.2d 1142 (1993), or describe the required level of specificity for pleading fraud. *See, e.g.*, *Palmberg v. City of Astoria*, 112 Or. 353, 369-70, 228 P. 107; 229 P. 380 (1924). As we discuss below, a defendant may be liable for fraud for a misrepresentation that creates a false impression even though it is impossible to identify the specific misrepresentation on which a person relied.

Defendant's argument goes to the heart of plaintiff's theory of fraud. In contrast to most fraud cases, plaintiff does not rely

on one or a few fraudulent statements made to one or a few identifiable individuals. Rather, her theory is that defendant, in concert with other tobacco companies, engaged in a decades-long public-relations effort to create the impression in the public that there was a legitimate controversy about the health effects of smoking, even though defendant knew that such an impression was false. According to plaintiff's evidence, defendant sought to create enough doubt about the connection between smoking and disease that potential and actual smokers would have something to which they could point to justify beginning or continuing to smoke. In order to evaluate that theory, we first discuss the facts and legal authorities that support it, again stating the evidence in the light most favorable to plaintiff, as required by our standard of review.

The first significant publicity about the effects of cigarette smoking on health came in the early 1950s, based on studies that showed that cigarette tar could cause cancer in mice and that established statistical correlations between smoking and lung cancer. Apparently as a result, total cigarette sales fell in 1953 for the first time in the twentieth century. In response to the publicity and falling sales, defendant, in cooperation with other tobacco companies, began a concerted campaign to undercut the impact on smokers and potential smokers of concerns about the consequences of smoking. The theme of the industry's publicity campaign, which continued into the 1990s, was that the effect of cigarette smoking on health was unclear and that more research was needed before a definitive answer would be possible. As plaintiff explains in her reply brief:

> "Defendant understood that it could never prove [that] cigarettes [are] safe; it was enough, however, to make it appear that there was a legitimate controversy over the link between cigarettes and lung cancer so as to give smokers like Jesse Williams something to tell themselves while they continued smoking. The message [that] defendant communicated to Jesse Williams to create the necessary uncertainty was the message that there was

doubt about the causal link between cigarette smoking and human disease."

According to plaintiff, defendant communicated this message to Williams and to smokers and nonsmokers throughout Oregon and the rest of the United States over several decades. What makes the message fraudulent, in plaintiff's view, is that defendant knew that there was no legitimate controversy about the health effects of smoking and that defendant itself had no doubt that cigarette smoking carried serious health risks, including the risk of lung cancer.

Defendant attacks both the legal and factual bases for plaintiff's theory, asserting that there "is not a shred of evidence that Williams ever saw or heard a false or misleading statement made by or attributable to Phillip Morris." Defendant emphasizes plaintiff's concession that she cannot point to a specific misrepresentation that Williams received. Rather, according to defendant, plaintiff is trying to recover for what plaintiff described to the trial court as a "fraud on the American public." Based on that understanding, defendant treats plaintiff's theory as a variation of the securities law concept of "fraud on the market." Under that concept, a purchaser or seller of stock may recover against a party whose fraudulent statements affected the market in which the plaintiff bought or sold, even if the plaintiff never personally received or otherwise knew of the misrepresentations. *See Basic Inc. v. Levinson*, 485 U.S. 224, 248 and n. 27, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). Defendant then describes its reasons for believing that that theory, to the degree that it is valid in the securities context, does not apply to this case.

We disagree with defendant's effort to characterize plaintiff's theory.[7] Rather, plaintiff's theory fits comfortably

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[7] Plaintiff's statements to the trial court on which defendant relies in support of its characterization were made in the context of her explanation that "there were so many

within traditional common-law principles.[8] Liability for fraud is not limited to those who deal directly with the injured party. Rather, a person who makes a misrepresentation may be liable to the intended recipients of a misrepresentation without regard to whether the person making the representation intends to defraud a particular person. As the Supreme Court said over 75 years ago, quoting a legal encyclopedia, it is a general rule of law in this country that:

> " 'Where misrepresentations are made to the public at large, or to a particular class of persons, with the intention of influencing any member of the public, or of the class, to whom they may be communicated, any one injured through proper reliance thereon may secure redress. In such a case it is not necessary that there should be an intent to defraud any particular person; but the representation must of course have been intended for the public, or for a particular class of persons to which the complainant belonged.' " *Coughlin v. State Bank of Portland*, 117 Or. 83, 96, 243 P. 78 (1926), *quoting* 26 CJ 1121-23, § 48bb.

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misrepresentations, so many attempts to create false impression, * * * plaintiff cannot now point to one[.]"

[8] In its verdict, the jury answered "yes" to the following question:

> "Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?"

The issue that the jury decided, thus, was based on traditional fraud concepts, not on the theory that defendant claims was the basis of plaintiff's case at trial.

In *Coughlin*, the plaintiff alleged that the defendants published misleading statements of a bank's financial condition and that the plaintiff relied on those statements in deciding to purchase stock in the bank. The Supreme Court held that the plaintiff's complaint stated a claim for fraud and entitled him to present his supporting evidence. *Id.* at 105, 243 P. 78.

In addition, under Oregon law, a defendant may make misrepresentations in many different ways.

> "To communicate a representation it is not necessary that the party should speak words, or write a message. The desired result may be accomplished ofttimes by conduct. Indeed, the tongue and the pen are only two of the numerous means of transmitting messages. * * * Indeed, the action for deceit * * * had its origins in false impersonation." *Pennebaker v. Kimble et al.*, 126 Or. 317, 322-23, 269 P. 981 (1928).

As examples of conduct that communicates representations, the *Pennebaker* court mentioned a buoy in a harbor warning of a shoal, a check drawn on a bank implying an amount on deposit to cover it, and Paul Revere's lanterns. It then quoted a New Jersey case, which itself quoted an encyclopdia, that held that a misrepresentation

> " ' "may consist in the creation of a false impression by words or acts, or by any trick or device, a deep laid scheme of swindling, or a direct falsehood, a combined effort of a number of associates or the sole effort of a solitary individual." ' " *Id.* at 323-24, 269 P. 981, *quoting Berkowitz v. Lyons*, 98 N.J.L. 198, 119 A. 20, 21-22 (1920), *quoting* 12 RCL 232.

Thus, under Oregon law, plaintiff does not need to prove that defendant expressly directed its misrepresentations to Williams or even knew of his existence, so long as plaintiff can show that Williams was within a class of people whom defendant intended to be recipients of and to rely on the

message that it conveyed. In addition, the fundamental character of fraud is the communication of a misimpression to induce another to rely on it. That is something that a defendant may do by a variety of actions as well as by specific statements. Plaintiff alleges that the message that defendant intended to convey was that there was a legitimate controversy about whether there was a connection between cigarette smoking and human health and that it intended to encourage smokers to continue to smoke and not to make the necessary effort to stop smoking. As a smoker, Williams was an intended recipient of defendant's message.

The evidence would permit the jury to find that defendant conveyed the message that plaintiff describes over many years and in many ways, intentionally creating an impression on which it intended Williams and other smokers to rely. The length of the time over which defendant conveyed the message, and the nature of the misrepresentations on which Williams relied, make it unlikely that plaintiff could single out a specific instance from all of the representations that Williams received. Defendant's purpose was to create an impression in the public's mind – including smokers like Williams – that the health issue remained undecided.[9] In late 1953, after the early studies linking cigarette smoking with cancer and the apparently connected fall in cigarette sales, a number of tobacco

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[9] Plaintiff also presented evidence showing that advertising for Marlboros emphasized images of healthy and strong men. The apparent purpose of that evidence was to show that the advertising created an impression that contradicted the idea that smoking could cause disease. Because there is sufficient evidence of direct representations to support the jury's verdict, we do not need to consider whether defendant's advertising strategy would also be relevant for that purpose.

companies, including defendant,[10] joined to hire a leading public relations firm to find a way to counter their effect. The first step in their subsequent campaign was the publication in January 1954 of "A Frank Statement to Cigarette Smokers."[11] Defendant and the other leading tobacco companies, together with several associations of tobacco growers and marketers, signed the statement, which appeared in 448 newspapers. The publicity covered the great majority of the country's population. In the "Frank Statement," the signatories stated that they believed that their products were not injurious to health and announced the establishment of the Tobacco Industry Research Committee (TIRC) to conduct research into "all phases of tobacco use and health." In 1964, the TIRC was divided into the Tobacco Institute, which focussed on public relations and lobbying, and the Council on Tobacco Research (CTR), which supported scientific research.

According to plaintiff's evidence, the "Frank Statement" was the beginning of a "common front" approach among tobacco companies on the health issue, with all companies expressing essentially the same message and using the TIRC and its successors to speak for the industry as a whole. Their

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[10] At the time, defendant was the fifth largest tobacco company in the country. In large part due to the success of Marlboros, its market share grew over the following years until it reached its current status of having approximately half of the domestic market for cigarettes.

[11] The trial court ruled that there was no evidence that Williams relied on the "Frank Statement," and plaintiff does not challenge that ruling on appeal. The "Frank Statement" remains relevant, however, as evidence of the beginning of a campaign on which, the jury could have found, Williams did rely. The court instructed the jury that it could consider the "Frank Statement" as relevant to defendant's knowledge or state of mind.

original position was to deny that there was a problem; thus in the 1950s and early 1960s Phillip Morris officials represented publicly that the company would "stop business tomorrow" if it thought that its products were harmful. However, as evidence of the harmful effects of tobacco increased,[12] the industry took a different approach. Particularly after the 1964 Surgeon General's report, which emphasized the connection between smoking and lung cancer, the industry focussed on keeping the "controversy" alive and calling for "more research" for the purpose of suggesting that the health question about cigarette smoking was not yet clear. In an internal memorandum shortly after the 1964 report, a Phillip Morris vice president explained that it was necessary to "provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." From the evidence in this case, the jury could properly infer that Williams was one of those smokers to whom defendant was referring.

Defendant and the industry continued throughout the 1970s, 1980s, and 1990s to encourage the impression that there was a genuine and continuing controversy. They did not expressly deny that cigarettes caused cancer but instead provided smokers what a Tobacco Institute memorandum described as "ready-made credible alternatives" to that conclusion by suggesting that there were other factors involved in the diseases of which smokers died and by emphasizing that there was "no proof that smoking causes cancer." The jury in this case could find from the evidence that, in making those statements, they relied on criteria for proof of causation that the scientific community generally either had never accepted or had since

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[12] One of plaintiff's expert witnesses testified that, by the late 1950s, there could no longer be a genuine scientific question about the connection between smoking and lung cancer.

discarded. Although defendant and the industry[13] emphasized the need for research, and although it is inferable from the evidence that defendant and other tobacco companies conducted a great deal of research into tobacco themselves and sponsored other researchers, they consciously avoided research in the United States that might indicate the biological effects of tobacco use and thus resolve the question that, they claimed, most needed further research. In particular, defendant conducted all sensitive research in a laboratory that it purchased in Europe, taking care to avoid preserving records of the results in this country. The person who was defendant's director of research in the late 1970s and 1980s told a subordinate that one of the director's functions was to "fuel the controversy" as to whether cigarettes cause disease. The director explained that it was his job

> "to attack outside reports of links between smoking and cancer or smoking and emphysema or things of that sort by maintaining that there's a controversy and providing the information that would discredit or somehow cast [doubt] on the outside research."

Defendant and the tobacco industry promoted their message through a large number of press releases and statements and through less obvious methods, including influencing the content of apparently neutral articles and cultivating "opinion leaders" who would convey their message. They attempted to used the power of their advertising to procure favorable treatment from the print media. Industry spokespersons appeared on news shows on commercial and public television to state their position on smoking and health issues. The theme of their statements was that the evidence concerning the health effects of tobacco was based primarily on statistical relationships and

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[13] The Tobacco Institute, rather than defendant itself, made many of the statements on which plaintiff relies. The jury could find that in making those statements the Tobacco Institute acted on behalf of defendant and other cigarette manufacturers.

that there was no proof that a specific tobacco component caused a specific disease. In addition, they suggested that there could be other causes, not connected to tobacco use, for the various diseases attributed to smoking. Although by the early 1990s the industry was forced to agree that tobacco could be a risk factor associated with a number of diseases, its spokesmen still publicly asserted that there was a long chain of intervening events involved before a disease arose from cigarette smoking. Defendant also stated publicly that it did not believe that cigarette smoking was addictive.

There is evidence that Williams received the message that defendant intended to communicate and that the message affected his decision to continue smoking and not to make more serious efforts to overcome his addiction to cigarettes.[14] Williams read the *Oregonian*, other newspapers and magazines, and watched television, all of which were media through which defendant conveyed its message. The evidence includes examples of newspaper stories describing the dangers of tobacco that also contain statements from industry spokespersons insisting that the dangers were not proved and at times attacking the validity of the research suggesting harmful effects. Industry newspaper advertisements conveyed the same message. For instance, in an article published in the *Oregonian* in 1991, an industry spokesman said that the dangers were not

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[14] Defendant points to the large amount of information available to Williams that emphasized the dangers of smoking to health. Plaintiff does not disagree with that point. Rather, her argument is that defendant created a controversy in order to give smokers like Williams a reason to continue smoking despite the information concerning the dangers. Plaintiff makes the argument, which the jury was entitled to believe from the evidence, that defendant knew that smoking was harmful to health but instead misrepresented that fact to the public for its own economic gain.

proven and argued that the money that the CTR spent on research showed how open-minded the industry was.

Williams' own statements show that he received and relied on defendant's misrepresentations. When Williams' family urged him to stop smoking, he responded that what he had seen on television demonstrated that smoking did not cause cancer. When his son gave him articles on the subject, he responded by finding his own articles that countered the dangers of smoking. After his diagnosis, he told his wife that the "cigarette people" had deceived him, that he had been betrayed, and that "they were lying all of the time." The jury could find from the evidence that no one other than defendant and the rest of the tobacco industry promoted the message to which Williams referred. Because of his exclusive use of Phillip Morris products, the jury could also conclude that he meant defendant when he referred to the "cigarette people."[15] Thus, the evidence supports a reasonable inference that Williams purchased cigarettes after September 1, 1988, in reliance on defendant's previous and continuing representations and that those cigarettes were a substantial factor in causing his lung cancer. Consequently, the trial court did not err in denying the motion for a directed verdict on the fraud claim.

Defendant raises no issues concerning the amount of compensatory damages awarded to plaintiff on the fraud claim. Because the award of compensatory damages on the fraud

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[15] Defendant argues that the only message that it is certain that Williams received was the health warning on each pack of cigarettes. There is evidence that Williams handled the packs in such a way that he seldom saw the warning. More significantly, when his wife drew his attention to the warning, Williams responded, "This is what the Surgeon General says, it's not what [the] tobacco company says." The existence of the warning was only one factor for the jury to consider in determining whether Williams reasonably relied on defendant's representations.

claim is greater than the award of compensatory damages on the negligence claim due to the effect of the comparative negligence verdict, we need not consider defendant's assignments of error concerning the negligence claim. The trial court properly entered judgment for plaintiff for compensatory damages on the fraud claim.

We turn to the issue of punitive damages. We first consider the requirements for an award of punitive damages and the standard by which we review a jury's decision to make such an award. ORS 18.537(1) and ORS 30.925(2) establish the criteria for the jury to apply in deciding whether to award punitive damages and in determining their amount. ORS 18.537(1) provides that, in order to recover punitive damages, the plaintiff must prove by clear and convincing evidence

> "that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."

ORS 30.925(2) establishes more specific criteria for awarding punitive damages in a product liability civil action:

> "Punitive damages, if any, shall be determined and awarded based upon the following criteria:
>
> "(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
>
> "(b) The degree of the defendant's awareness of that likelihood;
>
> "(c) The profitability of the defendant's misconduct;
>
> "(d) The duration of the misconduct and any concealment of it;
>
> "(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

If a jury awards punitive damages, both the trial and appellate courts review the amount of the award to determine whether it meets the statutory and constitutional standards. The legislature has codified the Supreme Court's statement of the nature of that review:

"If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding." ORS 18.537(2); *see Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 551 n. 10, 17 P.3d 473 (2001) (stating that ORS 18.537(2) codifies the standard established in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8, *cert. den.* 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996)).

The heart of the standard for reviewing awards of punitive damages, thus, is determining whether the award is one that a rational juror could make in light of the record as a whole and the legal factors that justify an award of punitive damages on the specific type of claim. In *Parrott*, the Oregon Supreme Court recently held that the rational juror standard is consistent with the federal Due Process standard discussed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The Court said that the *Gore* guideposts, together with the Oregon statutory standard, establish five

criteria that a court should consider in determining the range that a rational juror would be entitled to award:[16]

> "(1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive damages award is designed to serve * * *; (3) the degree of reprehensibility of the defendant's conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct [.]" *Parrott*, 331 Or. at 555, 17 P.3d 473.

Defendant argues that *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), undercuts the continuing vitality of *Parrott*. In *Cooper Industries*, the United States Supreme Court held that an appellate court must review a trial court's decision on whether an award of punitive damages is excessive as a matter of law rather than for an abuse of discretion.[17] In reaching that conclusion, the Court stated that the amount of a punitive damages award is not a finding of fact that implicates the

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[16] The trial court held that the jury's award of punitive damages was proper under the Oregon statute, but it reduced the award on the ground that it was excessive under the federal constitution. It reached that conclusion before the decision in *Parrott* and thus did not have the benefit of the Supreme Court's analysis in that case.

[17] The phrase that the *Cooper Industries* Court used was "*de novo*" review. As we have previously noted in discussing *Cooper Industries*, that is not a phrase that Oregon courts apply to the review of legal holdings; it is properly limited to the review of factual findings. *See Bocci v. Key Pharmaceuticals, Inc.*, 178 Or.App. 42, 50 n. 2, 35 P.3d 1106 (2001), *rev. pending* (2002); *Waddill v. Anchor Hocking, Inc.*, 175 Or.App. 294, 302 n. 5, 27 P.3d 1092 (2001), *rev. pending*.

Seventh Amendment's limitations on judicial review of jury awards. Defendant argues that that holding in *Cooper Industries* weakens the premise of *Parrott*, which defendant identifies as treating the review of a punitive damages award as the review of a factual determination by a jury. Rather, according to defendant, it is now clear that the imposition of punitive damages is not based on findings of fact but on the application of a constitutional standard to the facts of a case. Thus, according to defendant, the rational juror standard of *Parrott* does not satisfy constitutional requirements.

We disagree with defendant's understanding of *Cooper Industries*. The background for that case was the Court's long-established rule that the Seventh Amendment forbids appellate review of federal district court refusals to set aside jury awards of compensatory damages on the ground that they are excessive. The Court modified that rule several years before *Cooper Industries* to allow federal appellate courts to review district court determinations for abuse of discretion, at least in diversity cases when the substantive state law provided for that kind of appellate review. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996).

In *Cooper Industries* the Court held that a jury's determination of the amount of punitive damages was not a "fact" within the *Gasperini* rule and thus was subject to a broader scope of appellate review than it had established in that case. *See* 532 U.S. at 437-40 and n. 11, 121 S.Ct. 1678. However, it also recognized that determining the amount of punitive damages is a "fact-sensitive undertaking" that is appropriately left to the discretion of the jury. *Id.* at 437-38 n. 11, 121 S.Ct. 1678. The Court noted in *Cooper Industries* that the district court had instructed the jury concerning the factors for it to consider in awarding punitive damages. It then stated that, "[a]lthough the jury's application of these instructions may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would

permit a court, in reviewing a punitive damages award, to disregard such jury findings." *Id.* at 439 n. 12, 121 S.Ct. 1678. Finally, the Court reaffirmed that the *Gore* criteria are the appropriate criteria for reviewing an award of punitive damages for excessiveness. *Id.* at 440, 121 S.Ct. 1678.

The Court in *Cooper Industries*, thus, recognized the jury's primary role infinding the facts relevant to an award of punitive damages, in determining whether to make such an award, and in establishing the appropriate amount. *Cooper Industries*, in our view, does not alter the criteria by which a trial court is to review that award and, thus, does not affect the Oregon Supreme Court's discussion of those criteria in *Parrott*. Rather, what *Cooper Industries* does is to require an appellate court to review the trial court's decision on the amount of punitive damages as a matter of law-- that is, by plenary review--rather than for an abuse of discretion. *See also Bocci v. Key Pharmaceuticals, Inc.*, 178 Or.App. 42, 50-51, 35 P.3d 1106 (2001), *rev. pending* (2002). That is consistent with the way that we have always reviewed trial court decisions regarding punitive damages. *See, e.g., MacCrone v. Edwards Center, Inc.*, 160 Or.App. 91, 106, 980 P.2d 1156 (1999), *vacated and remanded* 332 Or. 41, 22 P.3d 758, *adhered to on remand* 176 Or.App. 355, 31 P.3d 513 (2001), *rev. den.* 334 Or. 190 (2002); *Blume v. Fred Meyer, Inc.*, 155 Or.App. 102, 114, 963 P.2d 700 (1998). We therefore follow the *Parrott* criteria, including the reasonable juror standard, in reviewing the jury's award against defendant, and we give no deference to the trial court's decision on the issue.

We first consider defendant's two assignments of error concerning the jury instructions on punitive damages. Defendant assigns error to the trial court's failure to instruct the jury that its award should bear a reasonable relationship to the harm caused to Williams. However, the proposed instruction would also have told the jury not to punish defendant for alleged misconduct towards other persons who might bring their own cases and receive their own punitive damages awards.

In *Parrott*, the Supreme Court made it clear that the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages. 331 Or. at 563, 17 P.3d 473. The proposed instruction's speculative reference to unknown other lawsuits by unknown other plaintiffs was contrary to that principle. It was also inconsistent with ORS 30.925(2)(g), which allows the jury to consider other punishments already imposed on the defendant. Because the proposed instruction was incorrect in that respect, we do not need to consider whether the rest of it was correct. The trial court properly rejected it. *See Simpson v. Sisters of Charity*, 284 Or. 547, 560, 588 P.2d 4 (1978) (trial court not required to give instruction that contains, in part, erroneous language).

Defendant also assigns error to the trial court's instruction that the maximum amount that the jury could award was $100 million. It argues that that instruction told the jury that it could award an amount that would have been far greater than what was constitutionally permissible. Plaintiff's complaint prayed for $100 million in punitive damages. The trial court in its instruction merely told the jury what plaintiff sought. Defendant did not move to reduce the amount of the prayer on the ground that it was greater than the evidence would support or that it sought an impermissible amount. In addition, telling the jury the upper limit that the pleadings establish for its verdict is consistent with ordinary Oregon trial practice. *See Wiebe v. Seely Administrator*, 215 Or. 331, 357, 335 P.2d 379 (1959).

We now evaluate the jury's award for excessiveness under the previously stated criteria. We begin by stating the relevant evidence that we have not previously described, again stating it in the light most favorable to plaintiff. *Parrott*, 331 Or. at 556, 17 P.3d 473. In addition to the evidence that defendant intentionally made false representations to Williams and that he relied on them to his detriment, plaintiff points to five categories of evidence to support the jury's award of punitive

damages in the amount of $79.5 million.[18] First, there is evidence that defendant knew that smoking caused lung cancer and other diseases at the same time that it publicly claimed that the issue was unresolved. As early as 1958, three British scientists, meeting with scientists and tobacco executives, reported that industry representatives believed that smoking could lead to lung cancer. In 1961, defendant's director of research stated internally that "carcinogens are found in practically every class of compounds in smoke" and that the best that the company could hope to do was to reduce their amounts. Later, defendant's internal memoranda made similar points, in some instances suggesting that the company could not admit the facts publicly because of the probable adverse legal consequences.

Second, defendant recognized that nicotine was both addictive and the primary reason why people continued smoking. The strongest statement of this fact may have been a presentation by a Phillip Morris scientist in 1972. In that presentation, he stated that the "cigarette should be conceived not as a product but as a package. The product is nicotine[.]" He continued, "[t]hink of the cigarette pack as a storage container for a day's supply of nicotine," and "[t]hink of the cigarette as a dispenser for a dose of nicotine." Defendant spent considerable effort in the following years studying the best way to deliver the optimal dose of nicotine in each cigarette and to increase the effectiveness of the nicotine, resulting in the

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[18] Defendant asserts that, because the jury declined to award punitive damages on the negligence claim, it could consider only evidence relevant to the fraud claim in determining whether to award punitive damages and in determining their amount. The evidence that defendant seeks to exclude from our review of the jury's decision relates to the consequences of defendant's fraudulent conduct, which is certainly relevant to an award of punitive damages. The evidence was admitted without limitation, and the jury was entitled to consider it.

discovery of a number of ways of manipulating the material in cigarettes for that purpose without actually adding nicotine to it.

Also, defendant carefully evaluated smoking cessation programs and technologies, concluding that alternative sources of nicotine, such as patches or gum, were ineffective in the absence of ongoing behavioral therapy. Because that therapy was expensive and time consuming, defendant thought it unlikely that it would have a serious effect on the number of smokers. Defendant's public relations program of creating a controversy that would give smokers a "crutch," a reason to believe that there were serious doubts that tobacco was harmful, thus, would discourage them from making the significant effort that was necessary to stop smoking. The "controversy" created by the tobacco industry was defendant's method of counteracting the information that otherwise suggested the harmfulness of cigarettes. Such an approach was aimed particularly at highly addicted smokers like Williams, who would search for any justification to continue smoking.

Third, defendant conducted research in such a way as to avoid studying the health effects of smoking, all the while asserting publicly that there was need for further research on that very issue. It used the CTR's research as a shield and as a source for expert witnesses at congressional hearings and in lawsuits against it rather than for research into the relationship between smoking and disease. The jury could have found on the record in this case that defendant specifically avoided testing with live animals and testing actual production cigarettes. On one occasion when defendant did test production cigarettes, the results were unfavorable, and it destroyed them. It is inferable from the record that tobacco industry lawyers, rather than scientists, set the general direction of the CTR's research program and that they did so for the purpose of protecting the industry's litigation position rather than to resolve scientific questions.

Also, the jury could have found that the tobacco industry had a "gentleman's agreement" not to conduct research beyond the scope of the CTR's efforts. Thus, to the degree that defendant conducted animal testing that was relevant to the relationship between cigarette smoking and human disease, it did so in a European laboratory and took precautions to ensure that the results of that research did not appear in its American records.

Fourth, defendant's actions caused harm to many others in Oregon besides Williams. Although a tobacco industry survey indicated that 85 percent of smokers wished that they had never started smoking, defendant concealed information that the addictive effects of nicotine made it difficult for them to stop without significant assistance. The fraudulent statements from defendant and the rest of the industry reinforced those addictive effects by giving smokers a reason not to make the necessary effort to break the addiction. The jury could find on this record that defendant's public relations campaign had precisely the effect that defendant intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams. It is also reasonably inferable from the evidence that defendant's products, used as defendant intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences.

Finally, cigarettes are relatively inexpensive to produce, and they provide a large profit margin. By maintaining a large population of smokers through fraudulent representations, defendant protected those profits. At the time of trial, defendant's net worth was over $17 billion. Its profit from cigarette sales in 1996, the year that Williams was diagnosed with lung cancer, was over $2 billion. In 1997, the year that Williams died and the most recent year for which figures were available at the time of trial, defendant's profit was $1.6 billion.

In light of the above evidence, we turn to the applicable criteria for an award of punitive damages.[19] First, the jury could find that there was a strong likelihood at the time of defendant's fraudulent statements that serious harm would arise from them. ORS 30.925(2)(a). Even at the beginning of defendant's public relations scheme, it was generally recognized that cigarette smoking had probable serious health consequences. Viewing the evidence most favorably to plaintiff, there was little doubt about the relationship between smoking and lung cancer by the late 1950s, and there was absolutely no basis for a genuine dispute on the issue by the 1970s and 1980s. Throughout that period, defendant continued its public relations campaign asserting that smoking had not been proven to be harmful and that more research was necessary. Its campaign was intended to give smokers a crutch to justify their continued smoking, and the jury could reasonably conclude that the message that defendant disseminated would put all of those who relied on it at risk and would cause serious harm to many of them.

Second, the jury could find that, by 1958, defendant was aware of the likelihood of the harm that its actions would cause and that it was certainly aware of that harm by the 1970s. ORS 30.925(2)(b). Third, defendant's misconduct was highly profitable, producing billions of dollars of profit over many years. There is evidence that defendant believed, in fact, that its misrepresentation of the dangers of smoking was important

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[19] The legislature first adopted those criteria for awarding punitive damages in 1979, Or. Laws 1979, ch. 866, § 3, although at least some of them reflect previous case law. Defendant thus was on notice of the possibility of a punitive damages award under Oregon law for its conduct 17 years before Williams was diagnosed with lung cancer and 9 years before September 1, 1988, the beginning of the period during which plaintiff had to prove that cigarette smoking was a substantial factor in causing Williams' death.

to its ability to continue in the cigarette business. ORS 30.925(2)(c). Fourth, defendant's misconduct lasted over four decades, and defendant concealed it as long as it could. The extent of defendant's actions did not become clear until judicially-required releases of documents occurred in the 1990s. ORS 30.925(2)(d). Fifth, there is no evidence that defendant showed any regret or changed its conduct upon the discovery of its actions. ORS 30.925(2)(e). Sixth, defendant is a wealthy corporation, and a small award of punitive damages would have little effect on it. ORS 30.925(2)(f). Finally, there is no evidence in the record of other punishment (including other punitive damages awards) inflicted upon defendant as a result of its misconduct. ORS 30.925(2)(g).

We turn next to the criteria that the United States Supreme Court identified in *Gore* and that the Oregon Supreme Court adopted in *Parrott*. The first *Gore* criterion concerns the state interests that an award of punitive damages is designed to serve. Those interests involve the health and lives of the state's citizens and residents. It is difficult to perceive how the state could have any greater interest than the preservation of the health and the lives of the citizens who make up the state. In *Waddill v. Anchor Hocking, Inc.*, 175 Or.App. 294, 27 P.3d 1092 (2001), *rev. pending* (2002), we held that there is a state interest in preventing injury to Oregon consumers from defective products and in punishing manufacturers who fail to investigate the safety of their products. 175 Or.App. at 306, 27 P.3d 1092. Here, the jury could find that defendant did not simply fail to investigate the safety of its products; it knew that they were unsafe and entered on a course of fraudulent conduct designed to encourage Oregon smokers to continue using those products despite the danger to their health.

The second *Gore* criterion concerns the reprehensibility of the defendant's actions. The jury could find from the evidence that defendant sought to make large amounts of money by engaging for more than four decades in a fraudulent scheme to induce people to use or continue to use a product that could

cause serious illness or death to a significant percentage of those who used it as intended. Because defendant's product affected the lives and the health of consumers as well as the economic interests of both consumers and nonconsumers, and because it occurred over an extended period, that conduct is far more reprehensible than the unlawful methods of selling used automobiles by the defendant that the *Parrott* court considered. In light of the Supreme Court's decision in that case, the comparative harm in this case strongly suggests an award of punitive damages.

The third *Gore* factor is the disparity between the punitive damages award and the actual or potential harm inflicted. Defendant argues that the primary issue in evaluating this factor is the ratio between plaintiff's compensatory damages and the punitive damages award. It notes that the jury's verdict would produce a ratio of 97 to 1, while the ratio after the court's remittitur is 39 to 1. It discusses a number of other cases in which the ratios between the plaintiff's injuries and the punitive damages award were considerably less and refers to several United States Supreme Court cases that appeared to give the ratio significant weight in determining whether an award was excessive. The difficulty with this approach is that, as the Oregon Supreme Court pointed out in *Parrott*, the federal court's treatment of the subject demonstrates that "no 'simple mathematical formula' controls our review of the ratio of punitive damages to actual and potential harm." 331 Or. at 563, 17 P.3d 473. That is not surprising, because it is inherently impossible to capture all of the qualitative factors that go into determining the appropriate level of punishment in one simple ratio.

In *Parrott*, the Supreme Court affirmed a verdict in a case of consumer fraud in which the ratio between punitive and compensatory damages was 87 to 1. In doing so, it explained:

> "Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change,

> we also consider the potential injury that its misconduct may have caused to past, present, and future customers. Additionally, although the actual economic harm that plaintiff suffered in this proceeding was relatively small, that harm was the result of defendant's 'particularly egregious' acts." 331 Or. at 563, 17 P.3d 473.

In this case, defendant's actions were part of its business strategy for over 40 years and, in defendant's own assessment, significantly contributed to its profitability. It is thus appropriate to consider the effects of defendant's actions on persons other than Williams in determining the amount of punitive damages. As we have already discussed, defendant's actions, even more than those of the defendant in *Parrott*, were "particularly egregious" and thus justify particularly strong judicial punishment. *See Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473 (1984) (purpose of punitive damages is "not to compensate an injured party, but to give bad actors a legal spanking"). In light of the 87 to 1 ratio in *Parrott*, we see nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury.

Beyond that, defendant's narrow focus on the ratio between punitive and compensatory damages ignores the underlying purpose for awarding punitive damages, which is to punish and deter a wrongdoer. The reprehensibility of the defendant's actions, the number of people affected or potentially affected, and indications that the defendant will not change its actions without punishment are all relevant factors. It is also clear that the defendant's wealth is an important consideration; an award that might be a serious punishment for one defendant could be only a minor inconvenience for another. *See Hicks v. Lilly Enterprises*, 45 Or.App. 211, 217, 608 P.2d 186 (1980). Oregon law has recognized that principle for over 60 years. *See State ex rel Thesman v. Dooley*, 270 Or. 37, 42, 526 P.2d 563 (1974); *Lamb v. Woodry*, 154 Or. 30, 47, 58 P.2d 1257 (1936); *see also* Restatement (Second) of Torts, § 908 and comment e

(1979). In this case, defendant's net worth is over $17 billion, and its profits for the year closest to the trial were over $1.6 billion, or approximately $30.7 million per week. The jury's award of $79.5 million, thus, is equal to a little more than two and a half weeks' profit.

Thus, there are at least two factors for determining the disparity between the punitive damages award and the actual harm inflicted in addition to the ratio to which defendant gives so much attention. First, when the defendant's conduct involves a course of conduct that has affected people other than the plaintiff, the jury may properly consider the effect of that conduct on those other people. Although defendant is legitimately concerned that there may be future punitive damages awards that, combined with the one in this case, would be excessive in total, ORS 30.925(2)(g) provides the appropriate method of avoiding that result. By requiring the jury and court to consider the total deterrent effect of other punishment imposed on defendant, including other punitive damages awards, it will permit future juries and courts to take previous awards into account when they set or evaluate punitive damage awards in future cases. The alternative to that approach is to limit punitive damages in this case to an amount that may be inadequate, based on speculation of what might happen in some unknown future case.

The second additional factor is that there is more to the issue of proportionality than the dollar amounts involved. First, when the record contains evidence of the defendant's financial condition, determining the proper relationship between the punitive award and the actual harm may well include consideration of that evidence. The same dollar amount will have a very different effect, for example, on a small, struggling business from what it will have on a large, profitable one. Second, some kinds of harm cannot be fully captured in money value. In this case, for example, the jury could have found that defendant's actions resulted in Williams' death; based on that finding, it could have believed, in light of defendant's profits,

that only a large award would be proportionate to the harm that defendant caused.[20]

The final *Gore* criterion concerns the civil and criminal penalties that could be imposed for comparable misconduct. The court in *Parrott* appears to have treated this factor as primarily related to fair notice to the defendant of the extent of punishment that the state might impose for its actions. 331 Or. at 563-64, 17 P.3d 473. Oregon law does not provide administrative or other civil sanctions for defendant's actions. Plaintiff argues, however, that first-degree manslaughter, ORS 163.118(1)(a), and second-degree manslaughter, ORS 163.125(1)(a), which impose penalties for reckless homicide, are relevant to this factor. The problem, as defendant points out, is that it is difficult to compare the criminal sentences available under the manslaughter statutes with the economic sanction of punitive damages, particularly when the defendant is a corporation. We do not believe that this factor plays a major role one way or the other. To the extent that the issue involves adequate notice to defendant, the established Oregon law of punitive damages, including ORS 30.925(2), was sufficient to alert defendant to the possible punishment for its fraudulent scheme. After consideration of all of the above

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[20] Defendant also suggests that it is being punished for its participation in a public debate concerning a matter of general importance and that that punishment violates Article I, section 8, of the Oregon Constitution. Defendant ignores that the jury could have found that, rather than engaging in a public debate, defendant made representations concerning the relationship between smoking and human health either without believing them to be true or in reckless disregard of their truth or falsity and that it did so to induce people like Williams to continue using its products. That kind of fraud is not something that the Oregon Constitution protects. *See Smallwood v. Fisk*, 146 Or.App. 695, 934 P.2d 557 (1997) (punitive damages for fraud are a historical exception to Article I, section 8).

factors, we conclude that the jury's award was not excessive under the criteria identified in *Parrott* and *Gore*, and the trial court therefore erred in reducing it.

Finally, defendant argues that the trial court erred in refusing to exercise its discretion under ORS 18.537(3) to reduce the jury's award to reflect a settlement that it and other cigarette manufacturers had reached with 46 states. That statute authorizes a court to reduce an award if the defendant establishes that it has taken reasonable remedial measures to prevent recurrence of the conduct that gave rise to the punitive damages award. Defendant argues that the settlement with the state qualifies under the statutory criteria. The trial court denied the motion on the ground that the settlement did not constitute an unequivocal acceptance of responsibility, which it believed was necessary to meet the criteria for a reduction in the jury's award under the statute. Plaintiff also argues that, to the extent that the statute permits a court to reduce a jury's award based on evidence that was not before the jury, the statute violates Article VII (Amended), section 3, of the Oregon Constitution.

We do not need to decide whether either defendant or plaintiff correctly understands the import of the statute. The factual foundation of defendant's argument is the Consent Decree and Final Judgment[21] that resolved the litigation between defendant and the State of Oregon. Section VI(G) of that judgment provides, in part:

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[21] Despite its caption, the document at issue is simply a judgment. Since the effective date of the Oregon Rules of Civil Procedure, "judgment" has been the sole correct term for the final determination of the rights of the parties in a civil action. "Decree," which formerly referred to the final determination of the rights of the parties in a suit in equity, is no longer appropriate. *See* ORCP 2; ORCP 67 A; *Webber v. Olsen*, 330 Or. 189, 192 n. 1, 998 P.2d 666 (2000).

> "*Neither this Consent Decree and Final Judgment nor any public discussions, public statements or public comments* with respect to this Consent Decree and Final Judgment by the State of Oregon or any Participating Manufacturer or its agents *shall be offered or received in evidence in any action or proceeding for any purpose* other than in an action or proceeding arising under or relating to this Consent Decree and Final Judgment." (Emphasis added.)

The trial court could not use the settlement as a basis for reducing the jury's verdict without the consent judgment somehow being in evidence. By its own terms, which reflect defendant's agreement with the state and the other parties to the litigation that led to the judgment, the settlement was not admissible for the purpose for which defendant seeks to use it in this case. The trial court did not err.

We do not discuss the remaining arguments of the parties because there would be no benefit to the bench or bar from our doing so.

On appeal, reversed and remanded with instructions to enter judgment on jury verdict; affirmed on cross-appeal.

APPENDIX B

OPINION ON RECONSIDERATION

Court of Appeals of Oregon

Nos. 9705-03957; A106791.

Mayola WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Appellant-Cross-Respondent,

v.

PHILIP MORRIS INCORPORATED,

Respondent-Cross-Appellant,

and

RJ Reynolds Tobacco Company, Fred Meyer, Inc., and Philip Morris Companies, Inc.,

Defendants.

On Respondent-Cross-Appellant's Petition for Reconsideration June 19, 2002.

Appellant-Cross-Respondent's Response to Petition for Reconsideration June 26, 2002.

Decided Aug. 7, 2002.

William F. Gary, and Harrang Long Gary Rudnick, P.C., Eugene, for petition.

James S. Coon, and Swanson, Thomas & Coon, Portland, contra.

Before EDMONDS, Presiding Judge, and ARMSTRONG and KISTLER, Judges.

EDMONDS, P.J.

Defendant petitions for reconsideration of our previous opinion in this case. *Williams v. Philip Morris Inc.*, 182 Or.App. 44, 48 P.3d 824 (2002). It asks us to modify our discussion of the effect of the consent judgment that defendant entered into with the State of Oregon as part of its settlement of the state's claims against it and other tobacco companies.[1] We allow the petition in order to respond to defendant's arguments, and we adhere to our previous opinion.

After the jury returned its verdict awarding punitive damages of $79.5 million, defendant offered the consent judgment in support of its argument that the trial court should reduce or eliminate the award of punitive damages. The trial court refused to consider it for that purpose, and we affirmed. As we explained in our previous opinion:

> "Finally, defendant argues that the trial court erred in refusing to exercise its discretion under ORS 18.537(3) to reduce the jury's award to reflect a settlement that it and other cigarette manufacturers had reached with all 50 states. That statute authorizes a court to reduce an award if the defendant establishes that it has taken reasonable remedial measures to prevent recurrence of the conduct that gave rise to the punitive damages award. Defendant argues that the settlement with the state qualifies under the statutory criteria. The trial court denied the motion on the ground that the settlement did not constitute an unequivocal acceptance of responsibility, which it believed was necessary to meet the criteria for a reduction in the jury's award under the statute. Plaintiff also argues that, to the extent that the statute permits a

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[1] According to defendant, that consent judgment followed the pattern of, and contained essentially the same terms as, consent judgments or decrees between defendant and the other 45 states involved in litigation with the tobacco industry.

court to reduce a jury's award based on evidence that was not before the jury, the statute violates Article VII (Amended), section 3, of the Oregon Constitution.

"We do not need to decide whether either defendant or plaintiff correctly understands the import of the statute. The factual foundation of defendant's argument is the Consent Decree and Final Judgment that resolved the litigation between defendant and the State of Oregon. Section VI(G) of that judgment provides, in part:

> "'*Neither this Consent Decree and Final Judgment nor any public discussions, public statements or public comments* with respect to this Consent Decree and Final Judgment by the State of Oregon or any Participating Manufacturer or its agents *shall be offered or received in evidence in any action or proceeding for any purpose* other than in an action or proceeding arising under or relating to this Consent Decree and Final Judgment.' (Emphasis added.)

"The trial court could not use the settlement as a basis for reducing the jury's verdict without the consent judgment somehow being in evidence. By its own terms, which reflect defendant's agreement with the state and the other parties to the litigation that led to the judgment, the settlement was not admissible for the purpose for which defendant seeks to use it in this case. The trial court did not err." *Williams*, 182 Or.App. at 72-73, 48 P.3d 824 (footnote omitted).

In its petition for reconsideration, defendant argues that plaintiff was not entitled to rely on Section VI(G) in opposing the admission of the consent judgment.[2] In defendant's view,

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[2] Defendant concedes that plaintiff adequately raised this issue at the trial court and on appeal, although it was not the focus of plaintiff's argument.

defendant may use the consent judgment against third parties in this fashion without their being able to object. In support of that position, defendant points to Section III(B) of the consent judgment, which provides:

> "This Consent Decree and Final Judgment is not intended to and does not vest standing in any third party with respect to the terms hereof. No portion of this Consent Decree and Final Judgment shall provide any rights to, or be enforceable by, any person or entity other than the State of Oregon or a Released Party. The State of Oregon may not assign or otherwise convey any right to enforce any provision of the Consent Decree and Final Judgment."

Defendant argues that, under that provision, plaintiff has no standing to enforce the consent judgment. From that proposition, it then attempts to draw the corollary that plaintiff may not invoke Section VI(G) in opposing defendant's attempt to use the consent judgment against plaintiff. According to defendant,

> "[i]t was the intention of the parties to the Consent Judgment to limit its admissibility in any subsequent proceedings between the parties in order to protect against the use of the [Master Settlement Agreement] or the Consent Judgment as some sort of admission of liability by the defendant. But the provisions of Section VI(G) have no effect in a suit against Philip Morris by a private party." (Footnote omitted.)

The difficulty with defendant's argument is its underlying premise that plaintiff is attempting to enforce the consent judgment, to assert rights under it, or to use it as some sort of admission of liability. Plaintiff did not do any of those things when it objected to the admission of the consent judgment into evidence. Defendant was the only party that attempted to assert a right under the consent judgment; it wanted the court to consider the judgment in mitigation of the jury's award of

punitive damages. Plaintiff's argument based on Section VI(G) is a response to defendant's offer of evidence and not a claim that plaintiff has any rights under the consent judgment. A party always has standing to object to the admissibility of evidence offered against it. *See State v. Tanner*, 304 Or. 312, 316, 745 P.2d 757 (1987) ("A criminal defendant always has standing to challenge the admission of evidence introduced by the state."). That is all that plaintiff did in this case.

Defendant may be correct that one purpose of Section VI(G) was to prevent other plaintiffs from using the settlement against it and the other settling parties; that is a common reason for such provisions in settlement agreements. In addition, Section III(B) prevents third parties from asserting any rights under the consent judgment. However, nothing in the consent judgment supports defendant's further assertion that the provisions of Section VI(G) have no effect in an action against defendant by a third party. The terms of Section VI(G) are clear and unlimited: the consent judgment is inadmissible "in any action or proceeding for any purpose" other than an action or proceeding arising under or relating to the consent judgment. There is no exception that allows defendant to use the consent judgment in actions against defendant by a third party. "[Not] offered or received in evidence" means "[not] offered or received in evidence." For the reasons that we stated in our previous opinion, the trial court correctly refused to consider the consent judgment in ruling on defendant's motion to reduce the award of punitive damages.

Reconsideration allowed; previous opinion adhered to.

APPENDIX C

DENIAL OF REVIEW

Supreme Court of Oregon

NOS. A106791, S49755

Williams

v.

Philip Morris Incorporated, RJ Reynolds Tobacco

December 24, 2002

183 Or.App. 192, 51 P.3d 670

DENIED.

Supreme Court, U.S.
FILED
JUL 28 2003
OFFICE OF THE CLERK

NO. 02-1553

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

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QUESTIONS PRESENTED

1. Whether a punitive damages judgment of $79.5 million in a case involving the death of a plaintiff, resulting from a 40-year campaign of misrepresentation about the health hazards of tobacco use, is unconstitutionally excessive under *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. ___, 123 S. Ct. 1513 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

2. Whether, pursuant to *State Farm* and *BMW*, Petitioner had a constitutional right to have the jury instructed that any punitive damages award must be reasonably related to the harm to the plaintiff.

3. Whether Oregon's "rational juror" standard for the review of punitive damages awards is unconstitutional under *State Farm*, *BMW*, and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

4. Whether a state law tort claim for misrepresentation is foreclosed by the preemption provision of the Federal Cigarette Labeling and Advertising Act.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Philip Morris engaged in one of the longest running, most profitable, and deadliest frauds in history. Jesse Williams died as a result of Philip Morris's lethal fraud, along with approximately 400,000 fellow Americans who die as a result of tobacco usage each year. Tr. Vol. 9-B at 138, Vol. 11-B at 41; Ex. 159. By 1997, when Jesse Williams drowned in his own blood after losing his battle with lung cancer, Philip Morris had known for at least 40 years that cigarettes cause lung cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. Pet. at 14a, 14a n.12; Tr. Vol. 12-B at 91-92, 9-A at 131-40, 11-A at 61-63; Ex. 50 at 1, 36 at 2. In an effort to maximize profit, Philip Morris either denied this knowledge outright, saying more research was needed, or disingenuously reassured its customers it would never jeopardize their health. Pet. at 12a-14a.

In 1952, *Reader's Digest* published an influential article on research findings that linked smoking with cancer. The article is credited with causing cigarette sales to fall for the first time in the twentieth century. Tr. Vol. 7-A at 109-10. To counter this trend, Philip Morris designed an elaborate public relations campaign to ensure that people continued to buy and smoke cigarettes. Pet. at 13a-14a. This campaign began with the publication of "A Frank Statement to Cigarette Smokers." Pet. at 13a. The "Frank Statement," which first appeared as an advertisement in major newspapers throughout the United States, stated that cigarettes were not injurious to a person's health and that their customers' health was a "basic responsibility, paramount to every other concern in our business." *Id.*; Ex. 7 at 2. The "Frank Statement" also announced the establishment of the Tobacco Industry Research Committee (TIRC) to conduct research into "all phases of tobacco and health." Pet. at 13a.

This document was the beginning of Philip Morris's "common front" approach to the relationship between smoking and health. Pet. at 13a. Over the next decade, similar statements were broadcast to the public including that Philip Morris would "stop business tomorrow" if it thought that its product was harming smokers, and that "there was no connection" between smoking and disease or Philip Morris "wouldn't be in the business." Pet. at 14a; Ex. 10, 11, 47, 161 at 1. At the same time it made these statements, Philip Morris knew that "[s]moking causes lung cancer." Ex. 28 at 2, 32 at 1, Tr. Vol. 11-A at 62-63.

In response to the 1964 Surgeon General's Report that smoking contributed substantially to mortality rates from lung cancer and other diseases, a Philip Morris vice president wrote an internal memorandum that stated "we must, on a future basis, give smokers a psychological crutch and self-rationale to continue smoking." Pet. at 14a. Thereafter, the self-described "brilliantly conceived and executed" public relations strategy to "defend itself" in "litigation, politics, and public opinion" was altered from the "vigorous denial" approach to a "counter propaganda" plan. Ex. 80 at 7-8, 83 at 1. In short, the new plan was designed to suggest "ready-made credible alternatives" to the idea that smoking causes disease, while still insisting that there was "no proof that smoking causes cancer." Pet. at 14a. It is a position Philip Morris maintained throughout the 1970s, 1980s, and 1990s. *Id.* This campaign of misinformation allowed people to rationalize their continued use of cigarettes. Ex. 50, 161 at 1, 175.

The "counter propaganda" was not limited to the relationship between smoking and health. Ex. 36 at 2, 106. Publicly, until 1994, Philip Morris also continued to deny that the nicotine in cigarettes was addictive. Ex. 148. Privately, Philip Morris concluded that "no other rationale is adequate to sustain the habit [of smoking] in the absence of nicotine." Ex. 72 at 2. The research

director of Philip Morris described the company's understanding best by stating that "I think the thing that we sell most is nicotine." Ex. 109 at 1. Yet, the addictive properties of nicotine remained secret because "the entire matter of addiction is the most potent weapon a prosecuting attorney can have in the lung cancer/cigarette debate. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" Ex. 110 at 2.

To increase cigarette sales, Philip Morris dedicated years of study to the role of nicotine addiction in smoking. Ex. 39, 44 at 1, 53 at 1, 58 at 1, 91 at 2. Specifically, Philip Morris used data that suggested that "a smoker [has] daily intake quotas for tar and/or nicotine" to its financial advantage by introducing lower tar and nicotine cigarettes. Ex. 57 at 1, 134 at 1, 139 at 1. As smokers switched to lower tar and nicotine cigarettes, they increased their cigarette consumption to maintain their nicotine intake. Ex. 57 at 1.

Philip Morris's long standing fraudulent scheme was very successful. The company shipped 235 billion cigarettes and made a net profit of $1.6 billion the year that Jesse Williams died. Pet. at 26a; Tr. Vol. 14-A at 49-50, 55. In 1996, when Jesse Williams was diagnosed with lung cancer, Philip Morris made a net profit of $2 billion. *Id.* at 58. At the time of Jesse Williams's posthumous trial, Philip Morris had a net worth of more than $17 billion and a 51 percent domestic market share. Pet. at 26a; Tr. Vol. 14-A at 57.

Jesse Williams received and relied upon Philip Morris's false statements made on television and through the print media. Tr. Vol. 12-B at 49-50, 80. It is known that Jesse Williams believed these messages because he told his wife that tobacco companies would not sell a product that caused cancer "because a tobacco company just would not do that." Tr. Vol. 12-B at 41. Moreover, as recently as 1994, Philip Morris published advertisements called "Facts You Should Know" in newspapers, including

the Portland *Oregonian*. Ex. 148. Among other things, the advertisements claimed that nicotine was not addictive. *Id.* Mr. Williams read the *Oregonian* and was generally a well-read person who liked to keep up with current events. Tr. Vol. 15-B at 130, 147-48, 15-A at 55.

Mr. Williams tried a number of times to stop smoking, but as he was "highly addicted," those efforts were unsuccessful. Tr. Vol. 4-B at 20, 12-B at 46-47, 51-52, 71-73. After being diagnosed with lung cancer, Jesse Williams told his wife that the "cigarette people" had "deceived" him, that he felt betrayed, and that "they were lying all the time." Tr. Vol. 12-B at 85. After his death, his widow filed this lawsuit to "make a difference for people that had been denied the evidence that cigarettes could harm them" and "let other people know that they were being deceived." *Id.* at 93-94. The evidence led to a finding that Philip Morris purposefully misrepresented known facts. Pet. at 11a-12a. Philip Morris acknowledged that Jesse Williams relied upon its messages when, in lower court briefing, it argued that the record contained evidence that he "clung to Philip Morris' few public statements related to smoking and cancer." Defendant's Reply Br. in Or. Court of Appeals, at 13.

During the 1999 trial, the court told counsel that the jury would be instructed that, pursuant to the prayer for relief, punitive damages would be limited to $100 million. Defense counsel told the court that this was "okay." Tr. Vol. 22-C at 87, 25 at 64. In addition, Philip Morris sought a jury instruction that stated, among other things, that the punitive damage award must bear a reasonable relationship to the compensatory damages and that "you may consider the extent of harm suffered by others" in determining punitive damages. Pet. at 3; Defendant's Reply and Cross Responding Br. in Or. Court of Appeals, at 37. However, much of this proposed instruction was contrary to Oregon state law, and the trial judge refused the instruction. Pet. at 22a-23a. The jury was instructed that only in-state conduct could be punished when

assessing punitive damages and the judge explicitly went through the six relevant Oregon punitive damage factors to consider under ORS § 30.925. Tr. Vol. 25 at 49-51.

On March 30, 1999, the jury rendered its verdict. J. at 1. The jury found Philip Morris liable on a claim of negligence but also found Jesse Williams was 50 percent negligent. The jury also found Philip Morris liable for misrepresentation. It awarded $21,485.80 in economic and $800,000.00 in non-economic damages for each claim.[1] The jury declined to award punitive damages on the negligence count. With regard to the misrepresentation claim, the jury specifically found that "defendant ma[d]e false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that "such false representations and reliance [were] a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988." J. at 3-4. The jury then awarded $79.5 million in punitive damages. *Id.* Upon Philip Morris's Motion for a Reduction of Punitive Damages, the trial court found the punitive damage award to be within the range that a rational juror could assess "based upon the record as a whole and applying Oregon, common law and statutory factors" but still reduced it to $32,000,000 in accordance with perceived "federal standards." Pet. at 4; Appellant's Br. in Or. Court of Appeals, at 39-40.

Both parties appealed. The Court of Appeals upheld the finding of fraud. It held that the evidence would permit the jury to find that Philip Morris affirmatively misrepresented that smoking was not harmful to a person's health and that it intended Mr. Williams and other Oregon smokers to rely on this misrepresentation. Pet. at 3a-17a. Further, the Court found that a number of Mr. Williams's statements constituted direct evidence

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[1] A statutory cap on noneconomic damages reduced the jury's $800,000 verdict to $500,000. Pet. at 2a, citing ORS § 18.560(1).

that Mr. Williams received and relied upon defendant's misrepresentations. Pet. at 17a.

The court reviewed the Petitioner's excessiveness argument *de novo* under both the applicable state statutory criteria, ORS § 30.925, and the *BMW* guideposts. Pet. at 18a-33a. Among other things, the Court found there was evidence for a jury to find that: Philip Morris knew smoking had serious health consequences and actively misrepresented this information; was aware of the likelihood of the harm that this decision would cause; believed that continued misrepresentations were important to its ability to make billions of dollars in profit; and engaged in actions that not only "caused a significant number of deaths each year in Oregon during the pertinent time period," but also caused "other serious but nonfatal health problems with their attendant economic consequences." *Id.* at 23a-26a.

The court then addressed each *BMW* factor in turn. With regard to the reprehensibility factor, the Court found the behavior to be particularly egregious in this case because Philip Morris sought to make large amounts of money by engaging in a fraudulent scheme, over a period of four decades, to induce people to use or continue to smoke cigarettes despite the fact that smoking would cause serious illness or death in a significant percentage of people. *Id.* at 28a-29a. When addressing the ratio between punitive and compensatory damages, the court found that the ratio to potential harm was not one that "raises our judicial eyebrows" and amounted "to little more than two and a half weeks' profit." *Id.* at 30a-31a.

Finally, as to *BMW* comparability, the court found that the "established law of punitive damages . . . was sufficient to alert the defendant to the possible punishment for its fraudulent scheme." Pet. at 32a. Petitioner then sought further review in the Oregon Supreme Court, which denied the petition. Pet. at 40a.

REASONS FOR DENYING THE PETITION

I. THE RULING BELOW ON PUNITIVE DAMAGES IS CONSISTENT WITH THIS COURT'S DECISION IN *STATE FARM*

A. A GVR Is Not Appropriate Where this Court's Intervening Decision Did Not Create New Law

Petitioner asks this Court to vacate the lower court's decision as "directly conflicting" with *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. ___, 123 S. Ct. 1513 (2003), and to remand for consideration in light of that decision. Pet. at 6.[2]

The request is inappropriate. This Court in *State Farm* established no new constitutional limitations on punitive damage verdicts. Rather, the Court found the excessiveness issue in State Farm "neither close nor difficult" while applying the well-established "principles set forth in *BMW of North America, Inc. v. Gore*, [517 U.S. 559 (1996)]." 123 S. Ct. at 1521. The Oregon Court of Appeals faithfully applied the very same principles in reviewing the punitive damage verdict. Although Petitioner disagrees with the Oregon court's application of the *BMW* principles to the facts of this case, that disagreement is neither justification for this Court to vacate and remand in order to require the Oregon court to decide the matter yet again, nor is that justification for what amounts to supervisory review of state court decision-making through the certiorari process.

In both civil and criminal cases, "a GVR order both promotes fairness and respects the dignity of the [lower court] by enabling it to consider potentially relevant decisions and arguments that were not previously before

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[2] Petitioner asks the Court for GVR with respect to its Questions Presented 1, 2 and 3. Pet. at 6-7, 9, 11, and 15. As to Question 4, dealing with an issue of federal preemption that was not present in *State Farm*, Petitioner presumably seeks plenary review.

it." *Stutson v. United States*, 516 U.S. 193, 197 (1996). Members of this Court "all are agreed that our GVR power should be exercised sparingly," mindful of "[r]espect for lower courts, the public interest in finality of judgments, and concern about our own expanding certiorari docket." *Lawrence v. Chater*, 516 U.S. 163, 173 (1996).

Because *State Farm* announced no new principles or guideposts but merely applied those established in *BMW*, which is precisely what the Oregon court did as well, remand cannot be justified and would serve only to delay justice further for the family of Jesse Williams, to the advantage of Petitioner. It would impose upon the Oregon court the burden of conducting further proceedings to consider issues already briefed, argued and resolved.

Additionally, a GVR in this case would add to this Court's expanding certiorari docket, essentially inviting every unhappy punitive damage defendant to petition for certiorari as a matter of course. It is worth noting that, in a large percentage of punitive damage awards, the parties settle post-trial or during the appeals process for amounts that are less than the judgment. Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 42-43. Raising expectations that full review or GVR is freely ordered by this Court in punitive damage cases will lead to the unintended consequence of discouraging such post-trial settlements.

That such petitions could become standard operating procedure by defendants is not a time-limited concern. Petitions for certiorari raising issues of constitutional excessiveness are regularly filed with this Court. Dissatisfaction with a state court's application of *BMW*, however, should not occasion a petition for certiorari. Nor should a new intervening decision of this Court that merely applies existing law. Sufficient safeguards exist in the state court systems without the need for yet another review of a verdict already confirmed by *de novo* review.

Compare TXO Production Corp. v. Alliance Resource Corp., 509 U.S. 443, 457 (1993)("Assuming that fair procedures were followed, a judgment . . . is entitled to a strong presumption of validity.").

In sum, this is a case in which "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court," so that a GVR order is inappropriate. *Lawrence*, 516 U.S. at 168.

B. The Oregon Court's Application of the "Reprehensibility" Guidepost Does Not Conflict With *State Farm*

1. *Petitioner Does Not Dispute the Strong State Interest in Punishing and Deterring Philip Morris's Life-Threatening Misconduct*

In *State Farm*, this Court reaffirmed that "each award must comport with the principles set forth in [*BMW v.*] *Gore*." 123 S. Ct. at 1525. The purpose of the *BMW* "guideposts" is to insure "adequate notice of the magnitude of the sanction that [a state] might impose." *BMW*, 517 U.S. at 574. As stated and applied by the Court in *State Farm*, the guideposts are:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

123 S. Ct. at 1520. *See also BMW*, 517 U.S. at 575.

In its effort to portray the Oregon court's opinion as in conflict with *State Farm*, Petitioner ignores most of the *BMW* principles and attempts to rewrite this Court's *State Farm* opinion to hold that the ratio of punitive damages to compensatory damages is the conclusive and overriding test of excessiveness.

Petitioner, for example, ignores this Court's admonition that an award can only be fairly characterized as "grossly excessive" by viewing it in relation to the State's "legitimate interests in punishing unlawful conduct and deterring its repetition." *State Farm* at 1519, quoting *BMW*, 517 U.S. at 568. "For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *Id.* There can be no disagreement regarding the strong interest of Oregon to punish and deter fraudulent misrepresentations, motivated by financial gain, with respect to consumer products that place its consumers at risk of serious injury or death for profit.

2. Petitioner Does Not Dispute the Court's Conclusion that Philip Morris's Misconduct Was Highly Reprehensible

"The most important indicium of the reasonableness of a punitive damages award," this Court said, "is the degree of reprehensibility of the defendant's conduct." *State Farm*, 123 U.S. at 1521, quoting *BMW*, 517 U.S. at 575. Courts are to "determine the reprehensibility of a defendant by considering" five factors:

> [W]hether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 1521, citing *BMW*, 517 U.S. at 576-577.

Each of these aggravating factors supports the substantial award of punitive damages in this case. In fact, the evidence in this case points to a record of reprehensibility that is unique in American history. Philip Morris is a company worth $17 billion, built on

sales of cigarettes, which in 1997 alone brought in profits of $1.6 billion.[3] Amazingly, Petitioner reaped these profits from selling a product that it knew would kill many of its own customers — not through misadventure or accident, but, as Petitioner admits, when "used as defendant *intended* them to be used." Pet. at 8 (emphasis added). The crux of this case is Petitioner's purposeful misrepresentation of this knowledge.

The numbers are staggering. Philip Morris cigarettes kill an estimated 200,000 Americans each year.[4] No other product sold in the U.S. kills as many as one in ten of its regular users.[5] How — especially in our increasingly health-conscious society — has Philip Morris managed to keep its customers smoking? One strategy, which lies at the heart of plaintiff's evidence in this case, has been a deadly, decades-long, fraudulent scheme to misrepresent the scientific facts about the risks of smoking and to exploit the addictive nature of nicotine. Starting in the early 1950s, as evidence linking cigarettes and cancer began to depress tobacco company profits, Petitioner and others in the industry devised a joint scheme to take advantage of the vulnerability of the class of addicted consumers they had created. They issued misrepresentations well into the 1990s that whether smoking causes disease is a matter of dispute among scientists and an open question that required further study. Petitioner knew not only that these statements aimed at smokers like Jesse Williams were false, but also

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[3] The company shipped 235 billion cigarettes and made a net profit of $1,607,000,000 in 1997, the year that Jesse Williams died. Tr. Vol. 14-A at 49-50, 55.

[4] The evidence was that cigarette smoking kills more than 400,000 Americans each year. Tr. Vol. 9-B at 138, Vol. 11-B at 41. Evidence showed that Philip Morris has approximately 51% of the domestic cigarette market. Tr. Vol. 14-A at 57.

[5] The jury, however, only considered the impact on smokers in Oregon, as it was instructed by the trial court.

that addicted smokers like Jesse Williams would cling to such statements to rationalize their smoking and avoid the difficult ordeal of quitting, which their addictions made even more arduous.

As the Oregon Court of Appeals summarized the evidence in the record, Philip Morris "sought to make large amounts of money by engaging for more than four decades in a fraudulent scheme to induce people to use or continue to use a product that could cause serious illness or death." Pet. at 28a-29a.

3. The Fact that Philip Morris's Misconduct "Caused a Significant Number of Deaths" Was Relevant to Reprehensibility

Petitioner makes no assignment of error regarding the lower court's legal standard of reprehensibility, its application of the five factors outlined in *State Farm*, or the court's conclusion that Philip Morris's misconduct was highly reprehensible. Instead, Petitioner focuses almost entirely on what it characterizes as the "hypothetical" claims of "past, present and future customers." Pet. at 7. The record evidence, not as a matter of conjecture but fact, established that defendant's products "caused a significant number of deaths each year in Oregon." *Id.* at 26a.

Such an acknowledgment by the court of appeals does not run afoul of this Court's holding in *State Farm*, despite Petitioner's assertion. *Id.* at 7. *State Farm* condemned consideration of a "defendant's *dissimilar* acts, independent from the acts upon which liability was premised, [and which] may not serve as the basis for punitive damages." 123 S. Ct. at 1523 (emphasis added). By contrast, the death of other smokers in Oregon was the consequence of the very same fraudulent misrepresentations alleged by plaintiff. The *State Farm* Court made clear that "conduct by [defendant] *similar* to that which harmed [plaintiffs]" is relevant to reprehensibility. *Id.* at 1524 (emphasis added). Indeed,

this Court has consistently stated that "repeated misconduct is more reprehensible than an individual instance of malfeasance," *Id.* at 1523, quoting *BMW*, 517 U.S. at 577. This Court added that "courts should look to 'the existence and frequency of similar past conduct'" in evaluating reprehensibility. *Id.*, quoting *TXO*, 509 U.S. at 462 n.28 and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

The Oregon court properly considered the harm to other smokers resulting from Philip Morris's misrepresentations to show what this Court subsequently called the degree of a defendant's "indifference to or a reckless disregard of the health or safety of others." *Id.* at 1521. Indeed, the *State Farm* Court added that out-of-state conduct, if similar to that directed at plaintiffs, would also be relevant to reprehensibility. *Id.* at 1525.

Second, Petitioner makes the specious assertion that the award punishes its "entirely lawful" conduct in manufacturing and marketing cigarettes. In doing so, Petitioner challenges its exposure to "liability of any sort" for making and marketing cigarettes, even though they are dangerous and cause "a significant number of deaths." Pet. at 7-8.

The fallacy of this argument is that Philip Morris was not held liable for selling cigarettes, but for making fraudulent misrepresentations about their safety. Such conduct is not lawful in Oregon or, for that matter, in any state. *See generally*, RESTATEMENT OF TORTS (SECOND) § 402B (1965)("One engaged in the business of selling chattels who . . . makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation.").

Finally, there is no merit to Petitioner's argument that it was "legally irrelevant" that Petitioner's fraudulent statements "caused a significant number of

deaths each year in Oregon." Pet. at 8. As detailed above, this Court in *State Farm* made clear that such evidence of repeated or similar misconduct resulting in harm to others *is relevant* to reprehensibility. 123 S. Ct. at 1523-24.

In conclusion, the harm caused by Petitioner "was physical as opposed to economic," "evinced . . . a reckless disregard of the health or safety of others," targeted "financial[ly] vulnerabl[e]" people, "involved repeated actions" over the course of four decades, and was the product of "trickery, or deceit." *Compare id.* at 1521. All of the potential elements this Court identified as establishing reprehensibility were present.

C. The Oregon Court's Application of the "Ratio" Guidepost Does Not Conflict with *State Farm* and Does Not Require a Jury Instruction on Relationship to Harm

1. State Farm Does Not Hold that High Ratios Are Presumptively Unconstitutional

Philip Morris would like this Court's opinion in *State Farm* to read that a ratio of punitive to compensatory damages in excess of single digits is "presumptively unconstitutional." Pet. at 6. It does not. To the contrary, the Court reiterated:

> "'[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.' We decline again to impose a bright-line ratio."

123 S. Ct. at 1524, quoting *BMW*, 517 U.S. at 582 (emphasis in original, citation omitted). *See also TXO*, 509 U.S. at 460 ("this Court [has] eschewed an approach that concentrates entirely on the relationship between actual and punitive damages."). For this reason, the Oregon court was entirely justified in rejecting

Petitioner's proffered jury instruction, *see* Pet. at 9-11, which was also contrary to Oregon law.[6] Pet. at 23a. The court itself considered the relationship between the harm effected and the punitive damages. That analysis entirely satisfied Petitioner's due-process rights.

High ratios between actual and punitive damages may be justified by the facts of a case. In *TXO*, this Court upheld a ratio of punitive to compensatory damages of 526 to one, 509 U.S. at 459, even after an earlier decision of this Court suggested that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 123 S. Ct. at 1524, characterizing *Haslip*, 499 U.S. at 23-24.

Justice Stevens has explained the circumstances warranting a high ratio:

> It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, *as well as the possible harm to other victims* that might have resulted if similar future behavior were not deterred.

TXO, 509 U.S. at 460 (emphasis added). Obviously, if those potential harms are taken into account, the compensatory denominator would be higher and the resulting ratio much lower. See *BMW*, 517 U.S. at 581. Philip Morris's efforts to keep its customers smoking

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[6] Under Oregon law, a trial court is not required to give an incorrect jury instruction or to give the correct portions of one which includes error. *Simpson v. Sisters of Charity*, 588 P.2d 4 (Or. 1978). The requested instruction covered three-and-a-half pages, was confusing, and self-contradictory. In raising the jury instruction issue in the Oregon Court of Appeals, Petitioner did not suggest any constitutional infirmity in the trial court's denial of their request. Petitioner should not be permitted to raise it for the first time before this Court.

contributed to the deaths of thousands of Oregonians and potentially threatened many more. Under any calculation of potential harm to punitive damages, the ratio in this case must be viewed as miniscule.

State Farm suggested that "in practice" more punitive awards with single-digit ratios will be found to comport with due process than those with much larger ratios. *State Farm*, 123 S. Ct. at 1524. The Court did not, however, create a blanket presumption that ratios higher than nine to one are grossly excessive in all cases. Indeed, the Court emphasized that "there are no rigid benchmarks" and that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* (suggesting that a 500-to-one ratio could also be justified under the proper circumstances); *see also id.* (there is no "bright-line ratio which a punitive damage award cannot exceed").

2. The BMW Guidepost Looks to the Relationship between the Award and the Harm Caused, Not the Compensatory Damages Awarded

Petitioner would prefer that due process be reduced to the simple mathematical exercise of expressing the award as a ratio of punitive damages to the compensatory award. That is not the guidepost established by this Court in *BMW*. Rather, the reviewing court must look at "the disparity between the actual or potential *harm* suffered by the plaintiff and the punitive damages award." *State Farm*, 123 S. Ct. at 1520 (emphasis added).

This Court's decisions addressing the excessiveness of punitive damages under the Due Process clause have all involved economic wrongdoing. In such cases, the amount of compensatory damages provides a convenient measure of the harm visited upon the plaintiff. If Philip Morris had defrauded Jesse Williams of property worth $500,000, then a verdict in that amount plus

consequential damages would accurately represent the "harm" inflicted.

In this case, the harm visited upon Jesse Williams was ultimate and irreplaceable. But the statutory cause of action for wrongful death does not even purport to determine the value of the life taken. Under Oregon's wrongful death statute, as in most states, compensatory damages are based on the monetary losses of decedent's family, such as medical bills, burial costs, and loss of the decedent's economic contribution to the family.[7] *See* ORS § 30.020.

For this reason, it is widely recognized that "[w]rongful death damages fail to compensate for the harm to decedent." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 941-42 (1998). *See also* William Landes & Richard Posner, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987)(The measure of recoverable damages "results in a systematic underestimation of damages in wrongful-death cases."). Thus, the amount of compensatory damages awarded in wrongful death cases, such as this one, do not represent the extent of the harm caused by the defendant, but merely the monetary loss to the surviving family. Nor can it be said that the compensatory damages awarded in this case were "substantial" or "complete compensation" for the life that was taken.[8] *Compare, State Farm*, 123 S. Ct. at 1524.

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[7] In Oregon, the surviving spouse and children are also entitled to noneconomic damages for loss of the "society, companionship and services of the decedent." ORS § 30.020(2)(d). That recovery, however, is limited to a maximum of $500,000 regardless of the amount the jury determines is necessary to compensate for those losses and regardless of the number of survivors. ORS § 18.560

[8] Studies attempting to place a monetary value on the loss of life have arrived at estimates ranging from $3-$7 million. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations In*

Even if the Court were inclined to tie punitive damages more closely to compensatory damages, a wrongful death case such as this one is an especially poor vehicle to do so. Fewer than half the states permit punitive damages in wrongful death cases. 1 John J. Kircher & Christine M. Wiseman, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.10 (2d ed. 2000). As one commentator has noted, "[w]rongful death is an area of the law in which the measurement of loss in pecuniary terms presents intractable difficulties." Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 30 n.140 (1982). A scholar who found a general correlation in awards between punitive and compensatory damages also discovered that "[t]he one exception to that pattern was in wrongful death cases." Michael L. Rustad, *In Defense of Punitive Damages in Proaucts Liability: Testing Tort Anecdotes with Empirical Data*, 79 IOWA L. REV. 1, 64 (1992).

Even scholars who advocate complete abolition of punitive damages acknowledge that wrongful death cases present an atypical situation of systematically low compensatory awards where punitive damages might be "needed to create adequate deterrence." Viscusi, *supra*, 87 GEO. L.J. at 334. For this reason, a wrongful death case presents a poor vehicle for this Court to establish a more rigid rule based on ratio.

An additional difficulty is that, because compensatory wrongful death damages largely reflect the financial contribution of the decedent, awards for the wrongful death of a child or a nonworking spouse are comparatively low. Polinsky & Shavell, *supra*, 111 HARV. L. REV. at 941 n.229. Consequently, the constitutional presumption urged by Petitioner amounts to a presumption that, as a matter of law, the wrongdoer who

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Environmental and Safety Torts, 87 GEO. L.J. 285, 314 (1998). "Court awards for compensatory damages after fatalities are typically well below that amount." *Id.*

kills a child or nonworking spouse is less deserving of punishment or deterrence than one who kills a healthy wage earner. The same rule of law would deem it more important to punish and deter misconduct that kills a rich person than a poor one. That such a rule of inequality should be read into the Fourteenth Amendment is particularly offensive.

D. The Oregon Court's Application of the "Other Penalties" Guidepost Does Not Conflict With *State Farm*

The third BMW guidepost is the comparison of the punitive award with the "civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. Philip Morris implicitly concedes that the Oregon Court of Appeals properly applied this guidepost. The company assigned no error concerning this issue in its petition to the Oregon Supreme Court or in its Petition to this Court.

The Oregon court accurately prefigured this Court's reluctance in *State Farm* to use criminal penalties — in this case state statutory penalties for manslaughter — for comparison with the amount of a punitive award. *Compare* Pet. at 32a *with* 123 S. Ct. at 1526.[9] As a matter

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[9] However, the Court did allow that the "existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action." *Id.* at 1526. Still, it should not require an act of the legislature to place defendants on notice that the State views misconduct that causes the deaths of its citizens as a serious matter.

Prosecutions of corporations for manslaughter or negligent homicide, while not commonplace, are increasing. *See* Annot., "Corporation's Criminal Liability for Homicide," 45 A.L.R.4th 1021, at § 2(a) (1986)("the trend seems to be toward" subjecting corporations to criminal liability for homicide).

In Oregon, following a contrary ruling in *State v. Pacific Powder Co.*, 226 Or. 502, 360 P.2d 530 (1961), the legislature enacted ORS § 161.015, which expressly includes a public and private corporation within the definition of "person" subject to criminal liability.

of state law, the court below found no applicable civil penalties.

The Oregon Court stated instead that the standards established by the Oregon legislature, including ORS § 30.925(2),[10] gave adequate notice "sufficient to alert defendant to the possible punishment for its fraudulent scheme." Pet. at 32a. After a careful review of the evidence, the court concluded that the jury award satisfied the statutory criteria. Pet. at 27a-28a.

This Court has stated that a punitive damage award that complies with fair procedures under state law "is entitled to a strong presumption of validity." *TXO*, 509 U.S. at 457; *BMW*, 517 U.S. at 586-87 (Breyer, J., concurring). That presumption should be even stronger in

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[10] Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

ORS § 30.925 (2).

Philip Morris was also afforded the protections of ORS § 18.537, which requires proof by clear and convincing evidence, court determination that a punitive award "is within the range of damages that a rational juror would be entitled to award based on the record as a whole," and reduction of punitive awards, where appropriate, based on remedial measures and previous judgments for punitive damages against the same defendant for the same conduct. Pet. at 18a.

this case, reflecting the "substantial deference" owed to legislative judgments concerning appropriate sanctions. *BMW*, 517 U.S. at 583.

E. The Oregon Court Did Not Impermissibly Use Wealth to Justify the Size of the Award

Petitioner also attempts to find conflict with *State Farm's* admonition that a defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." Pet. at 9. Surely Petitioner cannot be suggesting that the award is flawed because evidence of Philip Morris's wealth went before the jury. This Court acknowledged the propriety of such evidence, *State Farm*, 123 S. Ct. at 1525, citing with approval *BMW*, 517 U.S. at 591 (Breyer, J., concurring)(introduction of defendant's wealth is not "unlawful or inappropriate"), and Oregon law specifically permits it. See ORS § 30.925(2).

Instead, Petitioner apparently claims the Oregon court used wealth to justify the size of the award. In doing so, Petitioner conflates wealth with profit. The Oregon court of appeals specifically found that "the jury could have . . . believed, in light of *defendant's profits*, that only a large award would be proportionate to the harm the defendant caused." Pet. at 31a-32a (emphasis added and footnote omitted). Such a reference point is entirely proper, and nothing in *State Farm* suggests otherwise. *Compare Haslip*, 499 U.S. at 22 (approving a state punitive-damage standard that examined "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit"). Because *State Farm* provides no grounds upon which to find error in the Oregon court's consideration of the profitable character of Petitioner's fraud, there is no basis for remand or further review.

II. OREGON'S "RATIONAL JUROR" STANDARD COMPORTS WITH DUE PROCESS

Petitioner argues that Oregon's rational juror standard for review of the evidence supporting a punitive damage judgment is somehow defective under federal precedent. Pet. at 13. Here, as elsewhere, Petitioner's imagination has outrun reality. Rather than condemn the "rational juror" standard, this Court repeatedly has endorsed it.

After this Court, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), required Oregon to provide judicial review of punitive damages for excessiveness, the Oregon Supreme Court held that that such awards will "not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole." *Oberg v. Honda Motor Co.*, 888 P.2d 8, 10 (Or.), *cert. denied*, 517 U.S. 1219 (1996). This standard was subsequently codified by the Oregon legislature. ORS § 18.537. In adopting the "rational juror" standard, Oregon was not writing on a blank slate. In the federal *Oberg* decision, this Court found no defect in the use of "different verbal formulations" of the standard of review because:

> There may not be much practical difference between review that focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, [443 U.S. 307, 324 (1979)](whether "*no rational trier of fact* could have" reached the same verdict).

512 U.S. at 432 n.10 (emphasis added). It is clear, then, that the "rational juror" standard and *BMW's* "grossly excessive" standard are utterly compatible.

Federal courts utilize the "rational juror" standard in both criminal and civil matters. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 252 (1986). Courts apply the standard whether reviewing asserted errors where proof must be beyond a reasonable doubt, clear and convincing or by preponderance of the evidence. *Id.* Punitive damages pose no unique problem that requires departure from this familiar and stringent standard.

This Court's recent punitive damage jurisprudence represents no departure from these earlier holdings.

Moreover, this Court has recognized that the Oregon Constitution accords the jury, even in punitive damage cases, authority to set damages and found that this status "compel[s] the treatment of punitive damages as covered [by the right to a jury trial]". *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.10 (2001). Respect for state authority should compel this Court to defer to Oregon's standard, which does not violate due process, and which supplements but does not replace the *de novo* application of the *BMW* guideposts. The court below engaged in precisely that *de novo* examination following its state law analysis. Pet. at 28a-33a. *See also State v. Rogers*, P.3d 1261, 1278 n.8 (2000)(appellate courts review legal questions "anew and without deference to the decisions of trial courts"). The *Cooper* decision does not require Oregon to abandon its respect for jury findings. Even under the lesser jury trial standard available under the Federal Constitution, this Court said:

> [N]othing in our decision today suggest that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings [as are relevant to determining a punitive verdict.]

Cooper Indus., 532 U.S. at 439 n.12.

Petitioner attempts to evade these holdings by transmogrifying the "rational juror" standard into the "rational basis" test. Like alchemists of old, their claim should be rejected. The rational basis test is a highly

deferential test that forbids only utterly arbitrary decisions and permits the Court to imagine a legitimate rationale, unanchored by "evidence or empirical data," in order to withstand a due process challenge. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The "rational juror" standard, however, requires a court to examine the actual evidence and determine its sufficiency. *See Jackson*, 433 U.S. at 314-15, 324 (comparing "rational juror" as a more stringent standard with the arbitrariness of "any evidence"). *See also State v. Harris*, 609 P.2d 798 (1980)(finding federally mandated "rational juror" standard more stringent than "no evidence" rule set forth in Or. Const. Art. VII (amended), § 3).

The rational juror rule satisfies due process and sufficiently assures, in combination with the *BMW* guideposts, that "punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 20-21.

III. PETITIONER RAISES NO FEDERAL QUESTION REGARDING PREEMPTION, AN ISSUE IT WAIVED BELOW

A. Petitioner Did Not Raise Preemption on Appeal

Philip Morris contends that the Oregon Court of Appeals "based its affirmance of the punitive award in part on conduct for which liability is preempted by federal law." Pet. at 15.[11] Any issue Philip Morris has that devolves from preemption was waived below. After the trial, Philip Morris asserted that *"[t]he trial court agreed with Philip Morris' position on preemption."* Reply Br. in Or. Court of Appeals, at 3 (emphasis in original). That

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[11] Petitioner offers no argument that the lower court's reliance "in part" on an erroneous basis was so prejudicial as to warrant reversal.

position was that fraudulent concealment was preempted even if affirmative misrepresentations were not. Pet. at 6a-7a.

As the court of appeals noted, neither party on appeal challenged the trial court's ruling regarding the effect of 15 U.S.C. § 1331. Pet. at 7a. Indeed, Philip Morris asserted to the Oregon Court of Appeals:

> Philip Morris does not challenge the trial court's preemption rulings. . . . The trial court twice granted Philip Morris summary judgment motions on preemption. . . . The law of preemption (and the trial court's preemption rulings) required plaintiff to prove that Williams relied upon an affirmative misrepresentation.

Reply Br. of Philip Morris in the Or. Court of Appeals, at 3. Before the Oregon Court of Appeals, Philip Morris simply did not present any error concerning federal preemption. Instead, it merely challenged the sufficiency of the evidence that "it made any representation to Williams or that Williams relied on any representation that it may have made." Pet. at 7a (emphasis in original).

Oregon appellate rules require that error be assigned on appeal or the claimed basis for reversal is waived. OR. R. APP. P. 5.45. Federal law is the same. *See, e.g., Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991)(any issues not assigned "are considered abandoned on appeal and thus not reviewable"). Philip Morris failed to preserve any preemption issue that might exist.

B. The Ruling below Conforms to this Court's *Cipollone* Decision

Even if this Court were inclined to review this issue, the lower court's ruling falls squarely within this Court's holding in *Cipollone v. Liggett Group, Inc*, 505 U.S. 504 (1992), that state causes of action based on affirmative misrepresentations are not preempted by the Federal

Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*

A plurality of the Court in *Cipollone* held that the Act, as amended in 1969, preempts state product liability actions that are based on the cigarette maker's failure to warn beyond the congressionally mandated label warnings. On the other hand, the Court held, a cause of action alleging intentional fraud and misrepresentation, both by "false representation of a material fact [and by] conceal[ment of] a material fact," is not preempted. 505 U.S. at 528. The Court explained that, "petitioner's fraudulent-misrepresentation claims . . . are predicated not on a duty 'based on smoking and health' but rather on a more general obligation, the duty not to deceive." 505 U.S. at 528-29.

On Philip Morris's motion for summary judgment, and in conformity with *Cipollone*, the trial court dismissed plaintiff's claims "to the extent they were based upon (1) failure to warn, (2) a claim that Philip Morris neutralized the warnings given, or (3) a claim that Philip Morris had fraudulently concealed information concerning smoking and health." Rather, plaintiff was limited to allegations of affirmative misrepresentations. Pet. at 6a.

The jury found, based on the evidence that Jesse Williams did indeed rely on defendant's affirmative misrepresentations. In its verdict, the jury was asked:

> Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?

Pet. at 10a n.8. The jury answered, "Yes." *Id.*

C. Petitioner's Preemption Argument Merely Challenges the Sufficiency of the Evidence Supporting the Fraud Claim

The Petition raises no federal question regarding preemption. Rather, Petitioner's argument amounts to no more than its assertion that there was insufficient evidence as a matter of state law to support the jury's finding that Jesse Williams relied on defendant's affirmative misrepresentation. For example, Petitioner relies on *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171-72 (5th Cir. 1996), where the court upheld summary judgment against plaintiff on her fraudulent misrepresentation claim, finding that the evidence of reliance on the misrepresentations was insufficient as a matter of law. By contrast, the Oregon Court of Appeals in this case found sufficient evidence to support the jury's verdict. Pet. at 17a.

To fit within that case, Petitioner mischaracterizes plaintiff's claim as based on the "false impression" theory. Pet. at 16. The court below properly rejected that characterization. Pet. at 9a. Obviously, every fraudulent misrepresentation attempts to create a false impression.

Even if this Court were inclined to inquire into the evidence supporting the jury's finding, it need look no further than Petitioner's own statements. Philip Morris conceded below that it had issued 14 statements concerning smoking and health, seven of which were reported in newspapers, magazines or on television. Pet. for Review in the Or. Supreme Court, at 7. Significantly, it also argued:

> [A]ny misstatements by Philip Morris had the potential to affect only a subset of Oregon smokers — those who clung to Philip Morris' few public statements related to smoking and cancer, while at the same time ignoring the vast amount of information about the dangers of smoking. In fact,

> the record contains evidence of only one such smoker – Jesse Williams."

Reply Br. in the Oregon Court of Appeals, at 13.

Because the Petitioner raises no substantial federal question regarding preemption the Petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

July 28, 2003

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No. 02-1553

In the Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

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REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute that this Court should grant, vacate, and remand ("GVR") where there exist "'potentially relevant decisions and arguments that were not previously before'" the lower court. Opp. 7-8 (quoting *Stutson* v. *United States*, 516 U.S. 193, 197 (1996)). Her suggestion that this is not such a situation is completely meritless.

This is, indisputably, a case in which the court below:

- approved a 97:1 ratio of punitive to compensatory damages, Pet. App. 29a;

- expressly relied on harms to other Oregonians whose claims were not adjudicated at trial to justify the $79.5 million punitive award, Pet. App. 26a, 30a; and

- upheld the jury's verdict based in part on its sense that the jury "could have believed, in light of defendant's profits, that only a large award would be proportionate to the harm the defendant caused," Pet. App. 31a-32a.

Subsequent to the decision below, this Court held in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 123 S.Ct. 1513 (2003), that:

- "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *id.* at 1524;

- "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *," because, among other things, "[p]unishment on these bases creates the

possibility of multiple punitive damages awards for the same conduct * * *," *id.* at 1523; and

- a defendant's wealth is a factor that "bear[s] no relation to the award's reasonableness or proportionality to the harm," *id.* at 1525.

Respondent's specious contention (at 7-8) that *State Farm* offers no significant guidance regarding the law of punitive damages would mean that ***no*** case should be GVR'd for that decision. Opp. 7-8. In fact, however, in the wake of *State Farm* this Court has GVR'd every petition presenting a properly preserved pre-*State Farm* excessiveness challenge – most of which have involved far smaller awards and far lower ratios than the award and ratio at issue here.[1]

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[1] See *Cass* v. *Stephens*, 2001 WL 28092, at *30 (Tex. App. Jan. 11, 2001), *cert. granted and judgment vacated*, 123 S. Ct. 2213 (2003) ($2.5 million award; 25:1 ratio); *Sand Hill Energy, Inc.* v. *Ford Motor Co.*, 83 S.W.3d 483, 496-97 (Ky. 2002), *cert. granted and judgment vacated sub nom. Ford Motor Co.* v. *Smith*, 123 S. Ct. 2072 (2003) ($15 million award; 5:1 ratio); *Romo* v. *Ford Motor Co.*, 122 Cal.Rptr.2d 139, 164-65 (Cal. Ct. App. 2002), *cert. granted and judgment vacated*, 123 S. Ct. 2072 (2003) ($290 million award; 63:1 ratio); *Simon* v. *San Paolo U.S. Holding Co., Inc.*, 2001 WL 1380836, at *10 (Cal. Ct. App. Nov. 7, 2002), *cert. granted and judgment vacated*, 123 S. Ct. 1828 (2003) ($1,705,000 award; 340:1 ratio); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 272 F.3d 1335, 1347 (Fed. Cir. 2001), *cert. granted and judgment vacated*, 123 S. Ct. 1828 (2003) ($50 million award; 3.3:1 ratio); *Bocci* v. *Key Pharms., Inc.*, 35 P.3d 1106, 1108 (Or. Ct. App. 2001), *cert. granted and judgment vacated*, 123 S. Ct. 1781 (2003) ($57 million award; 45:1 ratio); *Waddill* v. *Anchor Hocking, Inc.*, 27 P.3d 1092, 1094 (Or. Ct. App. 2001), *cert. granted and judgment vacated*, 123 S. Ct. 1781 (2003) ($1 million award; 10:1 ratio); *Textron Fin. Corp.* v. *Nat'l Union Fire Ins. Co. of Pittsburgh*, 2002 WL 1399105, at *15 (Cal. Ct. App. June 28, 2002), *cert. granted and judgment vacated*, 123 S. Ct. 1783 (2003) ($1.7 million award; 10.3:1 ratio). The sole such petition to have been denied is that in *Time Warner Entertainment Co.* v. *Six Flags Over Georgia*, No. 02-978 123 S. Ct. 1783 (2003), a case in which "appellants abandoned any error with respect to a federal constitutional excessiveness claim * * *." *Time Warner Entertainment Co.* v. *Six Flags Over Georgia, LLC*, 563 S.E.2d 178, 184 (Ga. 2002).

Respondent's suggested reasons for treating this case differently are wholly untenable, as we now show.[2]

1. ***Reprehensibility Analysis.*** Respondent's effort to rehabilitate the Oregon court's reprehensibility analysis is futile. The court below never even suggested that the $79.5 million award was appropriate punishment for the effects of petitioner's misconduct on Jesse Williams alone. Rather, and directly contrary to *State Farm*'s holding that punishment cannot be based on harm to persons other than the plaintiff, the court upheld the award because, among other things, it believed that the jury could have found that petitioner's actions "affected ***large numbers of tobacco consumers in Oregon other than Williams***," and that "defendant's products, used as defendant intended them to be used, ***caused a significant number of deaths each year in Oregon*** during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences." Pet. App. 26a (emphasis added). The court also held that it was "appropriate to consider ***the effects of defendant's actions on persons other than Williams*** in determining the amount of punitive damages," and stated that "when the defendant's conduct involves a course of conduct that has affected people other than the plaintiff, the jury may properly consider ***the effect of that conduct on those other people***." *Id.* at 30a, 31a (emphasis added).

Clearly unable to justify the gargantuan award as punishment for Williams' claims alone, respondent cannot

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[2] Respondent makes the baseless assertion (Opp. 8-9) that a GVR in this case might spur an avalanche of petitions that somehow would overwhelm this Court. Neither efficiency nor justice is served by denying lower courts the opportunity to consider and apply intervening decisions of this Court that, like *State Farm*, are likely to alter the result of a case. In any event, the class of cases that are eligible for *State Farm* GVRs – those in which a punitive damages decision became final before *State Farm* came down but as to which the 90-day cert.-filing deadline has not yet run or has been extended – is self-evidently a small one.

help but take a similar approach, arguing that a GVR is not warranted because "Philip Morris's cigarettes kill an estimated 200,000 Americans each year." Opp. 12. As did the Court of Appeals, respondent treats this case as a quasi-class action, in which petitioner is being punished for harms suffered by all Oregonians resulting from cigarette smoking.

The effort by respondent and the Court of Appeals to punish petitioner for all Oregon harms caused by tobacco usage runs headlong into constitutional prohibitions set forth in *State Farm*. The claims of other Oregon smokers were not adjudicated in this proceeding; indeed, the record does not even contain mortality figures for Oregon or, more importantly, any evidence of the number of Oregon smokers who could establish that they were injured as the result of petitioner's alleged fraud. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *." 123 S. Ct. 1523. Yet that is plainly what happened here. See also *ibid.* ("A defendant should be punished for the ***conduct that harmed the plaintiff***, not for being an unsavory individual or business.") (emphasis added).

Punishment thus cannot be justified by simple reference to the deaths that result from smoking. There is absolutely no evidence in the record of how many people other than Jesse Williams – if any – smoke because false statements by petitioner led them to disregard the Surgeon General's warnings and other information about the hazards of smoking. In fact, as experience, common sense, and legal authority[3] confirm, the dangers of smoking have long been widely known, and for all kinds of reasons not attributable to any fraud by petitioner, many people who know that smoking

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[3] See, *e.g.*, *Soliman* v. *Philip Morris, Inc.*, 311 F.3d 966 (9th Cir. 2002); *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996).

causes cancer and other diseases nevertheless begin or continue to smoke. General mortality statistics and the like therefore cannot form the basis for punishment in this case.

Indeed, respondent's denials notwithstanding, the Oregon court's reliance on deaths from smoking generally can be understood only as a decision to enhance petitioner's punishment due to the harms caused by its sale of an inherently dangerous but legal product. *State Farm* confirms, however, that punishment for lawful conduct is improper. See 123 S. Ct. at 1522-23. We noted this critical point in our petition (at 7-8), yet respondent says not a word about it. Rather, she finds herself forced by the disproportionate award to embrace – even in the very first paragraph of her brief – precisely the approach that *State Farm* rejected: "Jesse Williams died ***as a result of Philip Morris's lethal fraud***, along with approximately 400,000 fellow Americans who die ***as a result of tobacco usage*** each year." Opp. 1 (emphasis added); see Opp. 11-13.

That approach is all the more improper because the jury in this case expressly ***declined*** to impose punitive liability on respondent's negligence counts, *i.e.*, the claims alleging that cigarettes are defective and unreasonably dangerous. It voted to award punitive damages for fraud only (and a novel fraud theory at that). Moreover, any assumption that one jury's liability finding fairly supports a conclusion that all sick smokers necessarily were tort victims would be entirely unwarranted. In 2003, for example, verdicts have been returned in a total of seven lawsuits by individual smokers seeking to hold Philip Morris liable for their illnesses. Six of these trials – each of which involved essentially the same allegations, documents, and even expert witnesses as this one – resulted in defense verdicts.[4] It would be the height of

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[4] *Reller* v. *Philip Morris Inc.*, No. BC 261796 (Cal. Super. Ct., Los Angeles Cty.); *Welch* v. *Brown & Williamson Tobacco Corp. et al.*, No. 00-209292 (Mo. Cir. Ct., Jackson Cty.); *Allen* v. *R.J. Reynolds Tobacco* (cont'd)

unfairness to nullify those juries' findings by allowing respondent to recover punitive damages as if she had proven that all smokers have been the victims of a tort. *State Farm* teaches that this type of one-way ratchet is impermissible.

Finally, respondent suggests that *State Farm* is inapposite because this case involves physical injury and death. Opp. 9-14. But there is no "physical injury exception" to the constitutional strictures set forth in *State Farm*. Nor is there any conceivable basis for any such distinction: the Constitution protects against unfair deprivation of property regardless of the characteristics of the underlying tort.[5]

2. ***Ratio Analysis.*** *State Farm* holds that, at least when compensatory damages are substantial (as here), even a ratio of 1:1 "can reach the outermost limit of the due process guarantee." 123 S. Ct. at 1524. And this Court reiterated in *State Farm* that as a general matter a ratio of 4:1 would be "close to the line of constitutional impropriety." See *ibid.* Ratios of between 4:1 and 9:1 are reserved for cases in which egregious conduct is coupled with low compensatory damages. The ratio here, of course, is a staggering 97:1. That figure speaks for itself and cannot be approved after *State Farm*.

In an effort to make the ratio seem smaller, respondent again relies inappropriately on harm to others. She also adds to the mix a fallacious claim that this Court approved a 526:1

(... cont'd)

Co. et al., No. 01-4319-Civ.-King (S.D. Fla.); *Inzerilla* v. *Philip Morris Inc.*, No. 11754/96 (N.Y. Sup. Ct., Queens Cty.); *Lucier* v. *Philip Morris USA Inc.*, No. 02ASO1909 (Cal. Super. Ct., Sacramento Cty.); *Carter* v. *Philip Morris USA, Inc.*, No. Aug. Term 1999 – 4567 (Pa. Commw. Ct., Philadelphia Cty.).

[5] Thus, three of the cases that this Court GVR'd in light of *State Farm* (cited in note 1, *supra*), – *Smith*, *Romo*, and *Waddill* – involve wrongful death and other personal injury claims.

ratio in *TXO Production Corp.* v. *Alliance Resources, Corp.*, 509 U.S. 443 (1993). See Opp. 15. As respondent surely is aware, however, "in *TXO* * * * the relevant ratio was not more than 10 to 1" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 581 (1996)), and probably considerably lower (see *TXO*, 509 U.S. at 462).[6]

Respondent also contends (Opp. 17-18) that, because wrongful death compensatory awards may understate the magnitude of the actual harm, normal ratio constraints should be deemed inapplicable. In so arguing, however, respondent obscures the true nature of the authority on which she principally relies. That article notes that where (unlike here) the victim is a child or a non-working spouse, wrongful-death damages undervalue a decedent's life. But the authors go on to explain that, "[i]f compensatory damages are too low in personal injury cases, they should be raised appropriately. Punitive damages should not be awarded to correct for inadequate compensatory damages * * *." Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 942 (1998). Like the *State Farm* Court, Polinsky and Shavell are firmly of the view that, as a general rule, compensatory damages are adequate to accomplish optimal deterrence. *Id.* at 877-87. They do not suggest that inflated ratios should be used to account for any shortcoming in the system's ability to value damages in wrongful-death cases.

3. ***Significance of a Defendant's Wealth.*** That the Court of Appeal's treatment of wealth is inconsistent with *State Farm* is clear from a simple juxtaposition of the two cases' holdings on the question. The court below stated that the jury "could have believed, ***in light of defendant's profits***,

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[6] The defendant in *TXO* indeed did argue that the ratio was 526:1. See 509 U.S. at 459. The plurality, however, ***rejected*** that view of the case, upholding the award only after determining that the relevant ratio was between 1.1 to 1 and, at most, 10 to 1. See *id.* at 462.

that ***only a large award would be proportionate to the harm*** the defendant caused," Pet. App. 31a-32a (emphasis added). That is, of course, a *non sequitur*, as this Court recognized when it explained in *State Farm* that the Utah Supreme Court had improperly relied on several premises, including "reference to [State Farm's] assets," which "***bear no relation to the*** award's reasonableness or ***proportionality to the harm***." 123 S. Ct. at 1525 (emphasis added). Respondent suggests (Opp. 21) that "profits" are somehow meaningfully different from "wealth," but she does not explain why that would be. Moreover, the court below relied on the entirety of petitioner's profits for a 40-year period (rather than profits earned from defrauding Jesse Williams or even derived from fraud in Oregon); such a plainly irrelevant number cannot form a proper basis for punishment. A GVR is clearly appropriate in light of *State Farm*'s explicit rejection of the very approach to petitioner's finances taken by the Oregon court.

4. ***Jury-Instruction Claim.*** The Court of Appeals held that the reasonable-relationship instruction tendered by Philip Morris was infirm because it would have told the jury not to punish for harms to non-parties. Pet. App. 22a-23a.[7] *State Farm* demonstrates beyond debate that the proposed instruction was not only correct, but required.

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[7] Philip Morris asked that the Court instruct the jury as follows:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

Respondent states that the requested instruction "was confusing, and self-contradictory" (Opp. 15 n.6), but nowhere explains what was "confusing" or "self-contradictory" about it. If, however, she is referring to the instruction's distinction between "consider[ing]" harm to others and punishing for it, it is she who is confused, for that distinction anticipated *State Farm* precisely. See 123 S. Ct. at 1521-22. The simple fact is that the proposed instruction was rejected because Oregon law ***does*** permit punishment for harm to non-parties. See Pet. App. 23a (applying *Parrott* v. *Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001)). Under *State Farm*, however, that aspect of Oregon law must give way. Petitioner was entitled to the requested instruction and is now entitled to have the matter reconsidered in light of the intervening *State Farm* decision.[8]

5. ***Rational Juror Standard.*** Respondent appears to concede that a "rational basis" standard of review would be unconstitutional. See Opp. 23-24. She suggests, however, that we have illegitimately "transmogrif[ied] the 'rational juror' standard into the 'rational basis' test," and she defends the former as consistent with this Court's precedents. But the characterization of Oregon's "rational juror" test as a "rational basis" standard comes from the Oregon Supreme Court, which has equated Oregon's "rational juror" standard with a test that asks "whether 'a rational basis' exists for the particular amount of punitive damages assessed." *Oberg* v. *Honda Motor Co.*, 888 P.2d 8, 11 (Or. 1995). Certainly after *State Farm*, a rational basis standard – which, in ***respondent's*** words, is a "highly deferential test that forbids only utterly arbitrary decisions and permits the [c]ourt to

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[8] Respondent's waiver argument on this point (Opp. 15 n.6) is entirely unfounded. Petitioner contended to the Court of Appeals that the instruction was necessary because, without it, the remaining instructions did not "adequately convey the constitutional standards that must guide the jury's discretion in awarding punitive damages." Philip Morris's Respondent's Br. and Op. Br. on Cross App. at 47-48.

imagine a legitimate rationale, unanchored by evidence or empirical data," Opp. 23-24 (internal quotation marks omitted) – cannot survive. A GVR is therefore required.

6. ***Preemption.*** Respondent's primary response to petitioner's preemption argument is an unfounded claim of waiver. In the trial court Philip Morris argued that a "false impression" theory of fraud would be preempted by the Labeling Act because it is, in essence, a claim of fraudulent concealment. See Philip Morris' Respondent's Br. and Op. Br. on Cross-App. at 28-31. The Court of Appeals agreed that "plaintiff may not base her fraud claim on allegations that defendant fraudulently concealed information concerning smoking and health. She is limited to allegations of affirmative misrepresentations." Pet. App. 6a-7a. Nevertheless, the court adopted respondent's false impression theory in toto. And in its Petition for Review to the Oregon Supreme Court, Philip Morris argued that the "false impression" theory of fraud adopted by the Court of Appeals is preempted by the Labeling Act. Petition at 17-18. There thus is no justification for respondent's waiver claim.

As to the merits, respondent simply asserts, as if saying it makes it so, that this was not a "false impression" case. Opp. 27. But as discussed in the petition (at 16-17), that is precisely how this case was tried and reviewed. The decision below thus conflicts with the Fifth Circuit's decision in *Allgood* v. *R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for consideration in light of *State Farm*. Alternatively, the Court should grant plenary review.

Respectfully submitted.

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